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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA BUFFINGTON, *et al.*,
Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where a jury has found a municipality liable for a jail suicide, and that liability is premised on 42 U.S.C. § 1983 under alternative theories of failure to train and condoned custom, should a court of appeals be permitted to overturn the jury's verdict by flatly discarding plaintiffs' evidence of condoned custom and failure to discipline; and then, once such evidence is discarded, hold that plaintiffs' proof of causation as to lack of training is legally insufficient under *City of Canton v. Harris*?

PARTIES TO THE PROCEEDINGS

Petitioners list herein all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioners and Plaintiffs-Appellees below: Barbara Buffington, individually and as personal representative of the estate of James E. Buffington, deceased; and David M. Buffington, individually. Respondents and Defendants-Appellants below: Baltimore County, Maryland, a body corporate and politic; Cornelius J. Behan, individually and in his official capacity as Chief of Police; Donald Gaigalas, individually and in his official capacity; Ronald L. Tucker; individually and in his official capacity. Defendants: Daniel Yuska, individually and in his official capacity; Joseph Gribbin, individually and in his official capacity; L.S. Harvey, individually and in his official capacity; Kenneth W. Kramer, individually and in his official capacity; and William L. Maeser, individually and in his official capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on July 31, 1990 (as amended Sept. 19, 1990).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the District Court's denial of judgment n.o.v. as to Baltimore County and Chief Cornelius J. Behan is reported at 913 F.2d 113 (4th Cir. 1990) and reprinted as Appendix A.[1] The order of the United States District Court for the District of Maryland, from which appeal was taken, is unreported and reprinted as Appendix B.

JURISDICTION

The opinion of the Court of Appeals was announced July 31, 1990 and amended on September 19, 1990. A timely petition for rehearing and suggestion for rehearing in banc was denied on October 15, 1990. *See* Appendix C. The Mandate of the Court of Appeals is attached as Appendix D. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

[1] References to the appendices bound with the Petition are styled "A ——". References to the district court transcript included in the record below are styled "Apx. ——".

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

STATEMENT OF THE CASE

A. Procedural and Factual History

On March 19, 1987 James Buffington, a 24 year old resident of Catonsville, Maryland, committed suicide while in the custody of the Baltimore County Police Department. James was openly suicidal on this date, and was apprehended by the police, at the request of his family, in order to prevent his threatened, imminent suicide. With knowledge that James was suicidal and in need of emergency psychiatric treatment, the desk officers at the Wilkens precinct placed him alone, unmonitored, in an isolated jail cell. Forty-five minutes later he was found dead at the end of a noose fashioned from his pants.

Barbara Buffington, individually, as the mother of James and as the personal representative of James' estate, and David M. Buffington, individually, as the father ("the Buffingtons"), brought this action pursuant to 42 U.S.C. § 1983 to redress the deprivation of their Fourteenth Amendment rights.[2] The Buffingtons asserted that the defendants were deliberately indifferent to James' acutely suicidal condition. They alleged that the failure to prevent James' suicide resulted from an unconstitutional policy and custom of the County and Chief Behan towards suicidal detainees. The Buffingtons alleged: 1) that Chief Behan had failed to implement *any* training as to the proper handling and care of suicidal persons in police custody; and 2) that the numerous prior suicides and suicide attempts ("suicide episodes") in Baltimore County lockups evidenced a custom of inadequate monitoring and care of suicidal detainees. They further al-

[2] The Complaint also alleged pendent state law survival and wrongful death claims.

leged that the police department's "sham" investigation of this suicide, and its failure to discipline the responsible officers, was yet additional evidence of the police department's custom of deliberate indifference towards suicidal detainees. Compensatory and punitive damages were sought against Baltimore County; Chief Behan; Donald Gaigalas (the desk officer who placed James in the cell); Lewis Harvey (the first patrol officer to respond to the 911 call for assistance); and two supervisory officers (Sergeant Daniel Yuska and Corporal Joseph Gribbin).[3]

Following a nearly three week trial, and after ten hours of deliberations, the jury announced that it was deadlocked, and Judge Joseph C. Howard declared a mistrial. Retrial commenced on December 29, 1988, and on January 18, 1989 the jury returned a verdict in favor of the Buffingtons on both the constitutional and negligence counts, and awarded a total of $185,000 in compensatory damages. Apx. 2277-82. The jury returned verdicts against Baltimore County, Chief Behan, Donald Gaigalas, and Ronald Tucker. Apx. 2277-82.[4] These defendants filed a "Motion for Directed Verdict and Judgment Notwithstanding the Verdict," and on February 27, 1989, the motion was denied. On May 12, 1989, attorneys' fees and expenses were awarded to the Buffingtons by Judge Howard pursuant to 42 U.S.C. § 1988. Apx. 927-52.

Baltimore County, Chief Behan, Donald Gaigalas and Ronald Tucker noted appeals from the judgment entered in favor of the Buffingtons. On July 31, 1990 the Fourth Circuit affirmed the judgment against Officers Tucker

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[3] The Amended Complaint (Apx. 160) added three additional defendants: Kenneth Kramer (Captain of the Wilkens precinct), and two desk officers, Ronald Tucker (who worked the desk with Officer Gaigalas), and William Maeser (an officer who worked the desk prior to being relieved by Gaigalas and Tucker).

[4] Defense verdicts were granted in favor of Harvey, Gribbin, Yuska, Maeser and Kramer.

and Gaigalas, and reversed the judgment against Baltimore County and Chief Behan.

B. Trial Testimony As To Unconstitutional Policy and Custom

The testimony presented by the Buffingtons' experts described the nationally recognized standards for the care of suicidal detainees. The expert testimony was presented for the purpose of aiding the jury in determining the threshold standard of care. From there the jury was able to infer that Baltimore County's inaction with respect to suicide prevention fell so far below the enunciated standard of care that it constituted deliberate indifference under § 1983 standards. The standards were discussed by Joseph R. Rowan and Dr. George L. Kirkham.[5]

Joseph R. Rowan was recognized by the trial court as an expert in the field of jail and lockup suicide prevention and as an expert in the training of jail and lockup officers concerning suicide prevention. Apx. 1566-68. Mr. Rowan is the former Director of the American Medical Association Health Care and Correctional Institutions Program (the "AMA Jail Project") which developed medical, psychiatric and chemical dependency standards for jails, police lockups and prisons, and further developed a national accreditation program in those areas. Apx. 1555-56. Mr. Rowan has conducted surveys of over 500 jails, lockups, correctional facilities or mental hospitals, and has been heavily involved in training police officers with respect to suicide prevention in lockups. Apx. 1564. Since 1982 he has trained the training staff, administrators and mental health personnel from approximately 200 police departments. Apx. 1564.

Mr. Rowan described the history of the problem of suicides in police lockups. Suicide has always been a

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[5] Dr. Kirkham is a uniformed patrol officer and a criminologist whose area of specialization is law enforcement standards and procedures in the United States. Apx. 1187-88.

problem in lockups but it has been receiving additional concentrated attention since the early to middle 1970's when surveys were begun. Apx. 1569; 1604-05.[6] The AMA Jail Project began in 1975 to develop standards and a national training program. Apx. 1572. An initial draft came out in 1976, and in September 1981 the AMA published the Standards for Health Services in Jails.[7] Apx. 1573-74. The AMA Standards require a *written* policy and defined procedures for the care of suicidal detainees. Mr. Rowan explained that the importance of a written policy is that "all staff will understand, there won't be so many individual interpretations of it, and it can be used for training." Apx. 1581.

A second major aspect of the AMA Standards, is the requirement for training. "[T]raining is the most important aspect of suicide prevention." Apx. 1582. Training is the single most important factor in preventing suicides (Apx. 1582-83) and is very inexpensive. Apx. 1608. Mr. Rowan explained that properly trained desk officers play a vital role in suicide prevention by receiving and communicating information about the detainee's status and by providing the necessary monitoring. Apx.

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[6] Chief Behan acknowledged that suicides in police detention facilities have been a problem ever since he started in law enforcement. (Apx. 2051).

[7] The AMA Standards served as a model for later developed standards by other organizations. Apx. 1586. In 1977 the American Correctional Association ("ACA") adopted the AMA Standards for use in local adult detention facilities, including police lockups. Apx. 1586. In 1980 the National Sheriff's Association also adopted the AMA Standards in their training manual for jails. Apx. 1586. In 1983 the Commission on Accreditation for Law Enforcement Agencies ("CALEA") adopted the AMA standards. Apx. 1594-99. The suicide prevention standards of the AMA were incorporated in the National Commission on Correctional Health Care Standards which were published in January, 1987. Apx. 1600; 1603. About 85% of the county jails throughout the country are using the standards set forth in the AMA, ACA, CALEA and National Commission standards. Apx. 1603-04.

1619-20. Dr. Kirkham also stressed that "[p]roper training of personnel with regard to suicide prevention . . . encompasses the requirement that personnel be instructed to constantly observe individuals who manifest suicide potential . . . ." Apx. 1891.

Mr. Rowan emphasized the importance of enforcing the standards through disciplinary action against officers who fail to adhere to the standards. Apx. 1613. "[T]he reason for disciplinary action is to prevent suicide attempts and completed suicides in the future, to bring about full compliance to the greatest extent possible with policies, procedures and practices." Apx. 1614. *He stressed that "where you do not have proper disciplinary action carried out, that's a license to continue what has been done in the past, and so then they will go on and continue with their ways of not following policies, procedures and practices . . . ."* Apx. 1614.

Having discussed the national standards, Mr. Rowan then turned his attention to how Chief Behan responded to the problem of lockup suicide.[8] He was severely critical of Chief Behan's utter failure to confront the problem. The department has never had a suicide prevention program. Apx. 1621-22. It failed to even compile data with respect to suicide episodes until 1983. Apx. 1625. Prior to the Buffington suicide, Chief Behan failed to promulgate a written regulation requiring the constant monitoring of openly suicidal detainees. Apx. 1625. He thus failed to implement the CALEA Standard 72.5.4 which required a *written* directive mandating that sui-

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[8] Cornelius Behan has been Chief of Police of Baltimore County since 1977. Apx. 2048. The Chief of Police is responsible for the good order and discipline of the department. Apx. 2049; 2159. His responsibilities include seeing that the county police lockup facilities are properly operated, and that detainees are properly cared for while in the custody of Baltimore County police officers. Apx. 2049. Chief Behan has the final say in determining the rules and regulations of the department. Apx. 2163.

cidal detainees should "be under observation at all times by facility staff." Apx. 1598-99; 1626; 2380.[9]

Although Chief Behan failed to issue a written directive requiring the constant observation of suicidal detainees (Apx. 1655), he ultimately had to acknowledge that it was the department's responsibility to keep obviously suicidal detainees under constant observation. Apx. 2204-05. Chief Behan suggested that it was immaterial whether the directive was actually in writing. Apx. 2204. However, the very absence of a *written* regulation was the basis for the Chief's insistence that Officers Gaigalas and Tucker were legitimately exonerated by Captain Kramer's Command Investigation into the Buffington suicide. Apx. 2204-05. Thus, it can be seen that Chief Behan's failure to implement a written regulation perpetuated the department's custom of deliberate indifference to suicidal detainees. Although recognizing its responsibility, the department refused to discipline its officers for violation of that responsibility because of the mere fact that no *written* regulation was violated.

Furthermore, prior to the Buffington suicide the department had *no* training on suicide prevention. Apx. 1627. Notwithstanding the many prior suicide episodes, Chief Behan denied that there was ever any indication of a need for desk officers to have specialized training as to the detention of suicidal subjects. Apx. 2189. Officer Hann was purportedly the person responsible for providing suicide prevention training over the last ten years. Apx. 2085-86. Officer Hann, however, denied that he trained desk officers on the specific topic of suicide prevention of detainees. Apx. 2149-50. Hann testified that

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[9] In 1984 Chief Behan ostensibly placed the department under the CALEA Standards. Apx. 2163; 2166. As explained by Mr. Rowan, an agency that gains accreditation is held to know the standards, and is therefore held to a higher degree of accountability. Apx. 1585. An agency that gains accreditation under false pretenses by failing to adhere to mandatory standards is guilty of deception on the accreditation process. Apx. 1585.

he did *not* teach officers how to process and care for a person in custody who may be suicidal. Apx. 2150; 2153. He testified that officers are *not trained* to keep the suicidal detainees out of a cell and in their physical presence while the paperwork is being done for the emergency evaluation. Apx. 2151-52.

Dr. Kirkham testified that Chief Behan's failure to provide suicide prevention training to desk officers was a "big gap" in the department's training. Apx. 1921. Likewise, in Mr. Rowan's opinion the suicide prevention training given to County police officers was "totally lacking." Apx. 1633. Mr. Rowan further found it very significant that *no County police officer has ever been disciplined for the mishandling of a suicidal detainee.* Apx. 1633-34; 2084-85.

Mr. Rowan further discussed his review of materials produced by the department concerning suicide episodes from December of 1977 through March of 1987. Apx. 1635. Because of inadequate record keeping, the precise number of suicide episodes is unknown but undoubtedly much higher than documented.[10] Prior to the Buffington suicide there were at least 57 suicide episodes since 1977. Apx. 1639; 2285-2300.[11] Twelve of the episodes involved actual suicides. Apx. 1640. Virtually all of the potentially suicidal detainees were not constantly monitored as required (Apx. 1641), and the monitoring was otherwise "grossly inadequate." Apx. 1654. Intervention to prevent suicide was "grossly inadequate." Apx. 1654-55.

Contrary to police regulations, only a handful of the episodes featured investigations with the required en-

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[10] Chief Behan acknowledged that the department's records of suicide episodes prior to 1983 were "not in any sense" complete. Apx. 2190. As recently as 1987, a department study determined that reports were not being filed in every instance. Apx. 2055.

[11] Since Cornelius Behan has been the Chief, command investigations of suicide episodes have come forward to his desk for review as required by county police rules and regulations. Apx. 2077.

dorsements as to recommendations for future changes. Apx. 1641. In those few instances where positive recommendations for improvement were actually made, no action was deemed necessary notwithstanding the pervasive awareness that the suicide episodes would continue to occur. Apx. 1641; 2285-90. There is not a single reference in the 57 prior episodes where a County police officer was found either negligent or in violation of a department regulation. Apx. 1647.

Mr. Rowan opined that Baltimore County and Chief Behan failed to comply with accepted law enforcement practice regarding the care and handling of suicidal detainees. Mr. Rowan perceived a total lack of suicide prevention training, and grossly inadequate supervision of staff. Apx. 1654. The review and documentation of prior suicide episodes was deemed "grossly substandard." Apx. 1655.

Dr. Kirkman summarized by stating: "despite some 57 suicide attempts and actual suicides up to the time of Jim Buffington, *nothing was being done at the top command level, nothing was being done by way of reaction at the precinct level to deal with this very, very serious problem.*" Apx. 1922. Dr. Kirkham found it "astonishing" that "nothing was done in the wake of the Command Investigations into the 57 prior episodes." Apx. 1939. Based on the evidence presented concerning the County's abysmal response to the suicide problem, the jury was clearly entitled to conclude that the County's conduct was the "moving force" in failing to prevent James Buffington's suicide.

C. The Failure to Prevent James Buffington's Suicide

In the early morning hours of March 19, 1987 James Buffington found himself in a state of extreme emotional instability.[12] About five days earlier his parents had de-

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[12] James Buffington resided with his parents in Catonsville, Baltimore County. Despite high intelligence, James performed

parted for a vacation. Apx. 1072. He had been residing alone in his parents' home during this time. Apx. 1072. At 4:30 a.m. he composed a suicide note, broke into his father's locked gun closet, and drove away with three handguns, two rifles and ammunition. Apx. 1074-76.

David Buffington, the older brother of James, was awakened by the sound of his father's car starting. Apx. 1074. David lived next door with his wife and infant daughter. Apx. 1069; 1074. Aware that James lacked a valid driver's license, David ran next door and discovered that the gun closet had been forced open and noticed a handgun was missing. Apx. 1074-76. He then discovered and read the suicide note. Apx. 1076-77; 2301-03. He immediately called the police on the 911 emergency line. Apx. 1079. David advised the dispatcher that he had found his brother's suicide note, and that James had taken a handgun with him. Apx. 1079. He gave a detailed description of his brother, and then drove off in search of James. Apx. 1080.

At approximately 5:05 a.m. Officer Harvey spoke to Kathryn Buffington (David's wife), and read the suicide note in its entirety. Apx. 1148; 1134. Officer Harvey then telephoned the Wilkens station to advise that James was suicidal and armed. Apx. 1138. Corporal Gribbin arrived at David's residence and also read the suicide note. Apx. 1109-10. Officer Harvey and Corporal Gribbin regarded James Buffington as in imminent danger of suicide. Apx. 1134; 1167; 1290; 1295.

Officer Thomas Hench and others apprehended James at about 5:47 a.m. Apx. 1313-15. He appeared intoxi-

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poorly in school. He suffered from a serious, uncorrectable learning disability which, in turn, severely frustrated him and led to repeated failures in life. Apx. 1070-71. He developed drug and alcohol problems which led to a series of encounters with law enforcement officers and the courts. Apx. 1070-71. In recent years there had been a substantial improvement in his condition. Apx. 1071. He overcame his drug and alcohol problems and the episodes of improper conduct ceased. Apx. 1071.

cated. Apx. 1315; 2308. Officer Hench searched the car and found two rifles and three handguns. Apx. 1316. Each weapon was fully loaded with a round in the chamber. Apx. 1340. James advised Officer France that he had so many guns with him because he could not decide which gun to use. Apx. 1340. Officer France transported James to the Wilkens station. At approximately 6:25 a.m. Officer Harvey telephoned Kathryn Buffington and advised her that James had been found alive, and was being held at the Wilkens station in protective custody. Apx. 1112. Officer Harvey explained that James had told him that he had not gone through with it "because he couldn't decide which gun to use." Apx. 1112.

At approximately 6:30 a.m. David Buffington arrived home from his unsuccessful search and telephoned the Wilkens station. Apx. 1081. He spoke to Officer Harvey who reaffirmed that James was in police custody. Apx. 1081. David reminded Officer Harvey of James' emotional/alcohol problems and expressed his extreme concern over James' suicidal state of mind. Apx. 1081-82. Officer Harvey acknowledged that he was fully aware of James' dangerous, suicidal condition. Apx. 1082.

Officer Harvey advised David that James would be promptly transported to a hospital where a psychiatrist would conduct an emergency psychiatric evaluation. Apx. 1082. Officer Harvey also advised David to place criminal charges against his brother so that, in the unlikely event that the psychiatrist chose not to commit James, the police would have a basis for detaining him while the Buffington family made other arrangements for an emergency psychiatric commitment. Apx. 1082-83. David accepted this advice and informed Officer Harvey that he would place criminal charges against James in order to ensure that he received prompt psychiatric care. Apx. 1083-84.

Prior to these telephone conversations, Officer Harvey had completed the paperwork necessary for the arrest

and charging of James, and he was preparing the emergency commitment papers. Throughout the arrest process James was handcuffed to a rail at the booking desk. Apx. 1144. According to every officer who came in contact with him, James was quiet, calm, and posed no inconvenience or disruption to the police business being conducted at the front desk.[13] Apx. 1193; 1243; 1327; 1345.

It was common knowledge in the station that morning that James was the suicidal subject everybody had been looking for. Apx. 1341. Desk Officers Gaigalas and Tucker knew that James was considered suicidal. Apx. 1405-07; 1414-15; 1375-77; 1392. Tucker and Gaigalas were fully aware that on many prior occasions disturbed detainees had committed or attempted suicide after being placed in a cell. Apx. 1160-61; 1403-04; 1390. They knew that suicide could quickly, silently and easily be accomplished by anchoring nooses fashioned from items of apparel to cell bars. Apx. 1160; 1404; 1390.

Persons not subject to discipline of the police department, however, are likely to go to unlawful extremes.

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[13] This description of James' demeanor differed dramatically from the observation of various prisoners who were in the Wilkens main lockup that morning. Defendants' counsel wrongfully withheld witness statements that directly conflicted with the officers' description of James' demeanor. After the first trial, the police department obtained statements from prisoners who were at the Wilkens main lockup on the morning of March 19, 1987. Contrary to the officers' descriptions of James, the prisoners heard James screaming suicide threats and described him as generally acting in a hostile and deranged manner. Apx. 465-71. The plaintiffs did not learn of these statements until after the second trial. Apx. 457-65; 646-57. Upon review of these previously concealed statements, plaintiffs moved for the court to impose sanctions on defense counsel. On June 26, 1989 the trial court found defendants' trial counsel in civil contempt. Apx. 977-1010. Although the Fourth Circuit vacated the contempt sanctions (on the basis that they were criminal in nature, and that they were not imposed under proper procedure), the Court of Appeals held that defendants' counsel were obligated to produce the statements, and that their failure to do so was santionable conduct. 913 F.2d at 135.

Notwithstanding their specific awareness of the extreme danger of placing a suicidal person in a cell, the desk officers, with deliberate indifference, placed James, unrestrained, into an isolated cell by himself. James remained alone in the isolation cell for about forty-five minutes, and was not placed under constant observation as required by minimal standards of custodial care. In view of James' state of mind, it was not only reasonably foreseeable, but entirely predictable that he would attempt to take his own life. Sometime between 6:25 a.m. and 7:15 a.m. on March 19, 1987 (Apx. 2314-15) James committed suicide by hanging himself with a noose fashioned from his pants and anchored to the bars of the jail cell. Apx. 2312.

Mr. Rowan opined that James was a red flag high risk candidate for suicide. Apx. 1618. The suicide note reflected "a high probability red flag suicide case . . . ." Apx. 1656. He displayed the most serious combination of suicide risk factors by penning a suicide note and by being placed in an isolation cell while under the influence of alcohol. Apx. 1618. Officers Gaigalas and Tucker thus provided grossly inadequate monitoring. Apx. 1657. Rowan opined that the conduct of Officers Tucker and Gaigalas was "very shocking." Apx. 1658.

Dr. Kirkham similarly opined that the desk officers departed from accepted standards and procedures. Dr. Kirkham stated that Officer Gaigalas' failure to conform to accepted standards and procedures "could only be described as shocking." Apx. 1917. The foreseeability of James' suicide was described by Dr. Kirkham as "astronomical" given James' profile and placement in a "high hazard" cell. Apx. 1917; 1946. Likewise, Officer Tucker's failure to ensure that James stayed handcuffed to the rail at the front desk pending transport to the hospital was an "extremely grievous" departure from national police standards and procedures. Apx. 1916.

Mr. Rowan concluded his testimony by stating, "I strongly feel that this is the worst case of handling of a

suicide case that I have ever seen." Apx. 1662-63. Dr. Kirkham agreed, finding "towering violations, severe violations of accepted police standards and procedures . . . ." Apx. 1903. In Dr. Kirkham's professional experience, the police department's failure to prevent James Buffington's suicide was "the worst case, the most flagrant case of violation of those standards that [he] had encountered." Apx. 1903. Even Sergeant Yuska admitted that placing James in the isolated lockup was the "worst" possible thing that could have been done to him at that time. Apx. 1229-30.

D. The Cover-up And Failure To Discipline

Regrettably, the police department refused to conduct a legitimate investigation into the shocking conduct that led to James Buffington's tragic suicide. Even more shocking, and even more troubling from an institutional point of view, was the exoneration of Officers Gaigalas and Tucker, and the department's failure to impose punishment.

Police department rules and regulations mandate that all detainee suicide episodes be investigated by the commanding officer of the precinct. Apx. 1450-54. The regulations require that the "Command Investigation" be passed up the chain of command with each command level adding an appropriate endorsement until the investigation reaches the Chief of Police. Apx. 1452; 2351-52. The ostensible purposes of this "Command Investigation" are to: determine whether any written or unwritten rules, regulations or policies of the department were violated; determine whether, apart from rules and regulations, any misconduct or negligence on the part of a police officer led to the death; and, to ensure that officers guilty of misconduct or negligence are properly disciplined. Apx. 1453. Unfortunately, such rules and regulations turned out to be nothing more than "window dressing."

In point of fact, Captain Kramer's Command Investigation in this case was most clearly a "non-investigation." Apx. 1843-44. His investigation consisted of little more than collecting written statements from the officers and assembling the various arrest documents associated with Buffington. Apx. 1980-81. Kramer did not interview the officers involved and failed to interview the nine other detainees in the precinct at the time of the suicide. Apx. 1847-48. He simply collected statements and issued his findings of fact *exonerating all police officers from responsibility for failing to prevent the suicide, finding no misconduct or violation of any rule, regulation or standard.* Apx. 1975. The Command Investigation thus falsely exonerated all officers and frauduently concluded that no misconduct or violation of police procedures had caused James Buffington's death.

At trial Chief Behan was forced to admit that it would not be appropriate to place a detainee, apprehended under circumstances identical to Buffington, into an isolated cell. Apx. 2193-96. Moreover, he acknowledged that CALEA standard 72.5.4 (Apx. 2380) (which he failed to implement) required his officers to "keep suicidal detainees under constant observation." Apx. 2201-04. In the face of these admissions, he persisted in defending this "sham" investigation, describing it rather tellingly as "an art form." Apx. 2204-06.

E. The Decision Below

The Fourth Circuit initially rejected the County's view that police officers had no constitutional duty to protect an obviously suicidal detainee from committing suicide. 913 F.2d at 119-20. The Court of Appeals held that the jury was properly instructed that they could find the officers liable under § 1983 "if it found that they knew that Buffington was suicidal and in need of emergency intervention, but nonetheless acted with deliberate indifference in failing to take any steps to prevent the suicide." *Id.* at 119. In affirming the verdicts against Of-

ficers Gaigalas and Tucker, the Court of Appeals noted that Gaigalas knew Buffington was suicidal before he took him to the cell, and that this went unchecked by Tucker who likewise was aware of Buffington's vulnerability to suicide. *Id.* at 117.

The Court of Appeals next addressed the County's liability under § 1983. The Court held that *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), entitled the County and Chief Behan to judgment. As noted by the Court of Appeals, "[i]n *Canton*, the Supreme Court outlined the circumstances under which a municipality can be held liable under § 1983 for constitutional violations resulting from a policy of failing to train municipal employees." 913 F.2d at 122. The Fourth Circuit emphasized that *Canton* requires proof of a direct causal link between the lack of training and the particular constitutional violation. *Id.* The Fourth Circuit then held that the evidence was legally insufficient to prove that the County's total lack of suicide prevention training proximately caused the failure to safeguard Buffington:

> We do not think the evidence was sufficient under *Canton* to permit a jury to find that a policy of failure to train officers in suicide prevention actually and proximately caused the particular harm that occurred here. Immediately before the suicide, Buffington was handcuffed to the rail by the precinct's booking desk, in conformance with the standard procedure used as a matter of policy for suicidal detainees at the precinct. Buffington would have remained handcuffed there until moved to the hospital but for desk Officer Gaigalas' decision, unchecked by his fellow desk Officer Tucker, to take him to an isolation cell without removing any of his clothing, arranging for monitoring, or taking some other preventive measure.

Id. at 123. The Fourth Circuit stated that "[i]t may well be, as the Buffingtons contend, that better suicide prevention training, closer adherence to national standards on jail suicide prevention, written regulations, or

some combination of these would have served to avoid what occurred here." *Id.* However, the Court of Appeals held that "*Canton* has made clear that municipal liability under § 1983 may not rest on such proof." *Id.*

The Fourth Circuit thus opined that Buffington's suicide could have been prevented if the desk officers had followed what the Court of Appeals described as the precinct's "official policy and customary practice" of keeping suicidal detainees handcuffed to the front desk:

> This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following the precinct's official policy and customary practice of keeping Buffington handcuffed to the rail, *i.e.*, by showing more than the deliberate indifference that the jury found. . . . Rather, in light of *Canton's* instruction on causation, we hold only that the normal practice of handcuffing such detainees to the rail, which was a part of those procedures, was 'sufficient to equip [Gaigalas and Tucker] to avoid the particular injury causing conduct' " in this case.

Id. at 123.

F. The Fourth Circuit's De Novo Fact-Finding As to Official Policy and Customary Practice

As highlighted below, there are five references in the Fourth Circuit's opinion to the County's purported "custom and practice" of monitoring suicidal detainees at the front desk:

> —"Several police officers testified at trial that it was *standard practice* to handcuff suicidal detainees to the rail by the booking desk rather than place them in the lockup, where they might be able, quietly and unnoticed, to hang themselves." 913 F.2d at 117.
>
> —"[*T*]*he department's officers did operate under a 'standing order'* that suicidal detainees should remain handcuffed to the rail by the front desk." *Id.*

—"Immediately before the suicide, Buffington was handcuffed to the rail by the precinct's booking desk, in conformance with *the standard procedure used as a matter of policy* for suicidal detainees at the precinct." *Id.* at 122.

—"This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following *the precinct's official policy and customary practice* of keeping Buffington handcuffed to the rail . . . ." *Id.*

—"[I]n light of *Canton's* instruction on causation, we hold only that *the normal practice* of handcuffing such detainees to the rail, which was a part of those procedures, was 'sufficient to equip [Gaigalas and Tucker] to avoid the particular injury causing conduct' in this case." *Id.* at 123.

The existence of this "policy or practice" (clearly a necessary predicate for the Fourth Circuit's *Canton* holding exonerating the County) can only be based upon an extremely selective reading of the isolated testimony of certain low level officers which suggests, at best, an informal, *ad hoc* practice occasionally followed by several officers at Wilkens. As will be shown below, however, the record in its entirety demonstrates compellingly that neither the department nor the Wilkens precinct had any such "policy or practice."

Moreover, the Fourth Circuit's complete failure to acknowledge or address the evidence and testimony which contraindicated the existence of the claimed "policy" also resulted in an implicit and improper finding of legal insufficiency on the Buffingtons' alternative theory of municipal liability (*i.e.*, condoned custom). As discussed earlier, the state of the record on appeal was that the Buffingtons had clearly established a legally sufficient basis for municipal liability founded on condoned custom. Thus, the Court of Appeals not only failed to assess the total evidence in the light most favorable to the Buffingtons, it also, in effect, decided the case, *sub silentio*, on a point not addressed in the Fourth Circuit's opinion.

G. The Evidence Supporting The Jury's Verdict As to Unconstitutional Policy and Custom

Although the Court of Appeals correctly found that the record evidence established that the County had failed to provide suicide prevention training (*see, e.g.*, 913 F.2d at 117) the Court overlooked the Buffingtons' additional evidence of unconstitutional policy and custom. To establish the existence of the policy and custom of failing to safeguard suicidal detainees, the Buffingtons relied primarily upon the testimony of: three expert witnesses (Joseph Rowan, George Kirkham, and Robert DiGrazia), eight police officers, a civilian employee, and also upon the testimony of Chief Behan and the internal records of the Department. The evidence covered a time period of ten years preceding Buffington's suicide.

The following nine witnesses either denied or did not know of the existence of a policy or custom to handcuff detainees to the front desk:

> —Sergeant Yuska denied that he promulgated "standard procedures or policies" for handling suicidal detainees on his shift—he stated merely that it was "my practice, which was a good habit of mine . . . ." Apx. 1205-06.
>
> —Officer Kamberger stated "once we have them [suicidal detainees] actually in custody I had no procedures what to do with him [sic]." Apx. 1352.
>
> —Corporal Gribbin stated that Yuska's practice "was not a blanket statement that was made, that was attributed to the entire station." Apx. 1301.
>
> —Captain Kramer denied being aware of Yuska's practice. (Apx. 1971). Kramer denied that all the shift commanders at Wilkens followed a policy of keeping suicidal detainees handcuffed to the rail. Apx. 1971. He stated: "Lieutenant Purper did, Sergeant Yuska apparently did, but that's two out of 20 I had, so I don't know how many others did or did not have any policy like that." Apx. 1971. Kramer added: "Placing him [Buffington] in the

lockup is no violation of our rules and regulations." Apx. 1975.

—Major Hauf, who was in charge of three precincts (Wilkens, Woodlawn and Garrison) Apx. 1447, stated that he was unaware of a practice that no suicidal detainees be placed in the lockup. Apx. 1497. Major Hauf concluded that "there were no infractions of departmental policy by placing James Buffington in an [isolated] cell in Precinct One [Wilkens]." Apx. 1532.

—Colonel Messina said he "wasn't familiar" with any policy or procedure that no known suicidal detainee was to be placed in a lockup. Apx. 1712. Messina was the Colonel of Field Operations, the number two position in the entire Department, second only to Chief Behan. Apx. 1688-89. He was responsible for over 1,200 men and women. *Id.*

—Joseph Deluca, a management assistant in the office of Colonel Messina, Apx. 1538, stated that he "was not aware that there was any kind of informal policy like that [*i.e.*, handcuffing suicidal detainees to the front desk] at all." Apx. 1543 "*To take that a little further, there is no such thing as informal policy.*" Apx. 1544.

—Major Shinnamon, Messina's successor, Apx. 1736, was not aware of a practice to keep suicidal detainees out of the lockup. Apx. 1752-53. According to him, putting Buffington in the cell "was not prohibited action by our rules and regulations." Apx. 1751.

—Officer Hann, an instructor at the Baltimore County Police Department Academy, Apx. 2131, agreed that officers are not taught that the lockup cell itself is a taboo area for holding a suicidal detainee. Apx. 2152. Hann conceded that many officers assume that a lockup cell is as safe as anywhere in the station for a suicidal detainee. *Id.*

Thus, the overwhelming testimony at trial was that no such appropriate policy or custom existed.[14]

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[14] It is well settled that an appellate court should disregard whatever evidence is inconsistent with the verdict actually reached by

In fact, Major Shinnamon testified to a contradictory written Departmental SOP (Standard Operating Procedure) that actually required the placement of suicidal detainees in isolation. Shinnamon stated that "[o]ur rules and regulations are very clear that with a person who is self-destructive you merely put them into an individual cell." [15] Apx. 1752. Shinnamon further stated that it was both "*reasonable and justified*" to place Buffington into an isolated cell. Apx. 1750. Obviously, Shinnamon could not have reached that conclusion if the department had an official policy and custom of keeping suicidal detainees handcuffed to the front desk. He so concluded "because it wasn't prohibited and it's not prohibited by the rules and regulations, which is something that guides us in just about all of our actions." Apx. 1755.

This departmental SOP certainly helps to explain why on Sgt. Yuska's shift alone at the Wilkens precinct (one shift out of 20 at that station, Apx. 1971), there were three or four actual suicides and eight to ten attempted suicides in the lockup in the "past several years" prior to Buffington's suicide. Apx. 1203. Significantly, although the Court of Appeals divined the existence of an official departmental policy and custom based on Sgt. Yuska's claimed personal habit, the jury could have inferred (from this high number of episodes in such a short time frame) that Yuska's personal practice was not followed even on his shift, Apx. 1205-06, but instead the departmental SOP was adhered to which mandated placing self-destructive persons in individual cells.

The jury was informed that suicides and attempted suicides have been a persistent, recurring problem in

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the jury. *E.g., Dennis v. Denver & R.G.W.R.R.*, 375 U.S. 208, 210 (1963) ("[t]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion").

[15] Shinnamon acknowledged that suicidal detainees can use virtually any item of appeal to hang themselves, Tr. 715; and that officers are "prohibited by law from stripping our prisoners." Tr. 715.

County lockups long before the callous mishandling of Buffington. Evidence of the 57 plus prior episodes was presented to the jury as more than a mere statistic. The department's investigatory file as to each episode was put into evidence.[16] Joseph Rowan testified—without any evidence presented to the contrary—that the investigations were uniformly superficial. He stated that the department's review and documentation of prior suicide incidents was "grossly substandard." Apx. 1655. Dr. Kirkham similarly testified to a lack of data collection and "event analysis." Apx. 1921-22. Both Mr. Rowan and Dr. Kirkham explained the significance of this. They said that thorough investigations were essential in order to take steps to prevent future suicides. Apx. 1607; 1921-22. As instructed by the district court, Apx. 2248, the inference that a policy existed may be drawn from evidence that the County repeatedly failed to undertake meaningful investigations. *See, e.g., Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

Mr. Rowan testified to a pattern of inadequate monitoring of suicidal detainees. Apx. 1641. He stated that on many occasions prior to Buffington's suicide, intoxicated and self-destructive detainees were placed in isolation cells. Apx. 1641. This, of course, was consistent with the department's SOP, Apx. 1752, that self-destructive detainees be placed in isolation cells.[17] The essence of the Buffington's custom claim was precisely this dem-

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[16] The records (Exhibits 2-213) were placed into evidence in a format that facilitated study by the jury. The records were placed into eight three-ring binders and were tabbed according to each detainee. The jury was also provided with a master chart (Ex. 1, *see* Apx. 2285-92) which summarized key information as to each episode. Apx. 1635; 1639-40. Each juror was provided with a copy of the chart so that they could follow along during Mr. Rowan's testimony. Apx. 1638-39.

[17] According to Dr. Kirkham, the department's SOP "would not be in conformance with accepted professional standards and practices, particularly in the sense that it does not require constant observation of potentially suicidal individuals . . . ." Apx. 1946.

onstrated pattern of failing to monitor suicidal detainees, and lack of departmental discipline.

The police records of prior episodes reflected an almost mechanical incantation within the conclusion of each investigation. Prior to and including the Buffington suicide, the department uniformly found "no evidence of police wrongdoing, no violations of police regulations, and no negligence." (See Exhibits 2-213). There is not a single reference in the 57 prior episodes where a county police officer was found either negligent or in violation of a department regulation. Apx. 1641. The jury could have certainly reasoned that a police department operating under constitutional standards would have found wrongdoing by Gaigalas and Tucker if it did not condone the failure to monitor suicidal detainees. As instructed by the district court, the jury had ample grounds to find ratification of the officers' misconduct by the department's failure to find any wrongdoing.[18] *See, e.g., Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987).

Although we certainly agree with the Fourth Circuit's observation that it is not necessary for police officers to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated cell with his pants on, 913 F.2d at 123 n.3, it is equally obvious that a Ph.D. was unnecessary for the officers who dealt with Buffington, including Gaigalas and Tucker, to figure out that there was no threat of discipline for causing his death or serious injury by placing him in isolation. Stated otherwise, training and follow-up supervision and discipline go hand

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[18] The Fourth Circuit stated that the jury rejected the Buffingtons' claims based on coverup. 913 F.2d at 118 n.1. Robert DiGrazia, however, testified to the extreme deficiencies in the Department's investigation of the Buffington suicide. Apx. 1843-1858). Simply because the jury did not return a verdict against Captain Kramer provides no basis to infer that the jury rejected the cover-up theory. The jury could have found that Gaigalas and Tucker were exonerated by virtue of the long-standing practices which Chief Behan found acceptable.

in hand. No County police officer has ever been disciplined for mishandling a suicidal detainee (Apx. 1633-34; 2084-85),[19] and a failure to discipline can constitute evidence of policy or custom. *See, e.g., Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2173 (1990) ("The Sheriff's failure to supervise and correct the situation in view of the numerous similar incidents and his failure subsequently to punish the responsible individuals is more than sufficient evidence of a policy or custom to render the County liable . . . ."); *Horton v. Flenory*, 889 F.2d 454, 459 (3rd Cir. 1989) (defendant officers were "not subject to the discipline of the Police Department, and thus [were] likely to go to unlawful extremes."), *vacated sub nom., New Kensington v. Horton*, 109 S.Ct. 1334 (1989) (remanded for further consideration in light of *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

Thus, it was certainly within the realm of the jury's role as the factfinder to determine that Chief Behan's "do nothing" response to the problem, including his failure to implement training or a *written* regulation requiring the constant monitoring of suicidal detainees, Apx. 1625-26, was the moving force behind the failure to safeguard Buffington. Chief Behan's failure to discipline Gaigalas and Tucker clearly ratified their shocking misconduct.

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[19] Captain Kramer stated "[y]ou cannot charge anyone with something that is unwritten and not a departmental policy." Apx. 1972-73.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE IMPORTANT ISSUE OF THE PROPER ROLE OF THE JURY IN DETERMINING *CANTON* CAUSATION ISSUES IN A FAILURE-TO-TRAIN AND CONDONED CUSTOM AND FAILURE TO DISCIPLINE CASE—AN ISSUE ON WHICH THE FOURTH CIRCUIT IS IN SHARP CONFLICT WITH OTHER CIRCUITS.

The holding of the Fourth Circuit is in conflict with holdings of the First, Eighth, Tenth and Eleventh Circuits that the requisite causal connection between a plaintiff's injuries and an unconstitutional municipal policy or custom is typically a jury question. *See, e.g., Berry v. City of Muskagee*, 900 F.2d 1489, 1499 (10th Cir. 1990); *Greason v. Kemp*, 891 F.2d 829, 839-40 (11th Cir. 1990) (a jury question existed as to whether warden's failure to take remedial action was causally connected to inmate's suicide); *Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) ("[i]n the usual case, factual allegations of a failure to train would support an inference that failure to act in accord with proper training in that area was causally connected"); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989); *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989); *Bordanaro v. McLeod*, 871 F.2d 1151, 1157-58 (1st Cir.), *cert. denied*, 110 S. Ct. 75 (1989); *Trudeau v. Wyrick*, 713 F.2d 1360, 1366 (8th Cir. 1983) ("[t]he question of proximate cause is, however, normally one for the jury").

Once it is understood that the Fourth Circuit's view of the "official policy and customary practice" is contrary to the record in support of the verdict, it cannot be said that the Buffingtons' proof of causation was legally insufficient as to deficient training policy. This is especially true in light of the Buffingtons' voluminous companion proof of unconstitutional condoned custom and failure to discipline. The jury could reasonably have concluded that a sufficiently trained, supervised and disciplined set of desk of-

ficers would not have acted so far below the level of acceptable police behavior.

Although the precise question was not addressed in *Canton* (in light of the fact that it was prosecuted *exclusively* on a failure-to-train theory, *see* 109 S.Ct. at 103 n.5), the Court did not suggest that causation issues should be decided as a matter of law in cases proceeding on both failure-to-train and condoned custom theories. The defense of the role of the jury in deciding causation issues in such § 1983 municipal liability cases is indeed worthy of the time and attention of this Court.

II. THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT (*I.E.*, SUFFICIENCY OF CAUSATION PROOF IN CASES BASED ON ALTERNATIVE THEORIES OF FAILURE TO TRAIN AND CONDONED CUSTOM AND FAILURE TO DISCIPLINE).

This case presents a question that "is important and appears likely to recur in § 1983 litigation against municipalities . . . ." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981). In cases prosecuted on alternative theories of failure to train and condoned custom there is a need for clarification of the requirement of a causal connection between the ultimate injury and the failure to train and/or the unconstitutional custom. In *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), the Court held "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 109 S.Ct. at 1204 (footnote omitted). The claim of unconstitutional custom was not presented in *Canton* as an alternate basis for municipal liability. The *Canton* Court stated:

> However, to the extent that this claim poses a distinct basis for the city's liability under § 1983, we

> decline to determine whether respondent's contention that such a 'custom' existed is an alternate grounds for affirmance. The 'custom' claim was not passed on by the Court of Appeals—nor does it appear to have been presented to that court as a distinct ground for its decision. . . . Thus, we will not consider it here.

109 S.Ct. at 1203 n.5. Unlike *Canton*, in the instant case the custom claim was presented as a distinct ground for affirmance of the verdict against Baltimore County and Chief Behan.

The causation requirement needs clarification in order to give guidance to the lower courts on what cases can be disposed of as a matter of law and what cases must be decided by the jury. The *Canton* Court stated:

> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officer's indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

109 S.Ct. at 1206. The issue not presented in *Canton* but squarely presented in the instant case is: how far can a Court of Appeals go in ruling as a matter of law that causation is not established? This case calls for the Court to further shape the contours of municipal liability in the context of litigation prosecuted on alternative theories of failure to train and condoned custom. The Fourth Circuit

is in effect telling district courts to dispose of § 1983 municipal liability cases by way of summary judgment or directed verdict. In cases like *Buffington*, this is incomprehensible.

III. REVIEW OF THE DECISION BELOW WOULD BE A PARTICULARLY APPROPRIATE EXERCISE OF THIS COURT'S SUPERVISORY POWER, GIVEN THE TROUBLING SEVENTH AMENDMENT PROBLEMS POSED BY THE CIRCUIT COURT'S DECISION.

The *de novo* fact-finding of the Court of Appeals, and its willingness to place itself in conflict with other federal circuits on matters of federal law, provide ample justification for this Court's plenary consideration of this case.

Specifically, the Buffingtons contend that under the standard for assessing the existence of a jury question, the evidence was sufficient to support the jury verdict imposing municipal liability on the basis of deficient training policy and/or condoned custom. Two points are listed below:

(1) The Fourth Circuit overlooked the voluminous evidence in support of the jury's conclusion that the failure to safeguard Buffington occurred as the direct and immediate consequence of an unconstitutional training policy and custom of failing to monitor openly suicidal detainees. More specifically, there are two key factual underpinnings to the Fourth Circuit's decision: *first*, that the Baltimore County Police Department had an "official policy and custom" of properly monitoring suicidal detainees (by keeping them handcuffed to the rail); and *second*, that the Buffingtons' theory of municipal liability was limited to allegations of deficient training. As discussed earlier, the first premise ignores overwhelming evidence to the contrary. There is in fact ample evidence that the police department did *not* have an official policy or custom of keeping suicidal detainees handcuffed to the booking desk.

Moreover, the second premise simply disregards the fact that the Buffingtons' case against Baltimore County was not based solely on a lack of training. It was also based on the alternative theory of condoned custom. *See Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 752 (1988) ("deficient training policy" and "condoned custom" theories are alternative ways of establishing municipal liability).

(2) The Fourth Circuit's opinion contravenes the principle that a directed verdict is authorized only if "there can be but one reasonable conclusion as to the verdict. . . . If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 247, 250-51 (1986). This case calls upon the Court to reaffirm once again the basic limitations upon the scope of appellate review by a Federal Court of Appeals. The Supreme Court's view of the respective jobs of the judiciary and jury thus bears repeating: "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, ... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. at 255.

It is respectfully suggested that the Fourth Circuit's opinion appears to reflect an unspoken concern about the exposure of local government to monetary liability for "constitutional torts." Manifestly, however, this case is not about holding the County responsible because of an isolated incident involving a bad apple or two who simply failed to follow an established police procedure. Buffington, just like many openly suicidal detainees before him, was not properly monitored and died a desperate death because that is the way the Baltimore County Police Department did business.

The constitutionally protected right of trial by jury requires that an appellate court refrain from substituting its judgment for that of the jury. With all due re-

spect, the Court of Appeals, however, has overlooked the evidence set out above upon which a reasonable jury could find in favor of the Buffingtons' claims of deficient training policy and condoned custom. Notwithstanding the difficulty of deciding issues of causation in determining municipal liability, the Court in *Canton* expressed its every confidence that "judge and jury, doing their respective jobs, will be adequate to the task." 109 S.Ct. 1197, 1206 (1989). The holding of the Court of Appeals, when analyzed in light of the full record, is an impermissible encroachment on the jury's vital role in deciding issues of causation in this exceedingly important area of civil rights litigation.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January —, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 88-1161, 89-1021, 89-1040,
89-1054 and 89-1055

BARBARA BUFFINGTON, Individually and as Personal Representative of the ESTATE OF JAMES E. BUFFINGTON, deceased; DAVID M. BUFFINGTON, Individually,
Plaintiffs-Appellees,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Indivdually and in his official capacity,
Defendants-Appellants,

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L.S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,
Defendants.

IN RE JOHN A. AUSTIN; JAMES G. BEACH, III,
Appellants.

BARBARA BUFFINGTON, Individually and as Personal Representative of the ESTATE OF JAMES E. BUFFINGTON, deceased; DAVID M. BUFFINGTON, Individually,

Plaintiffs-Appellees,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L.S. HARVEY, Individually and in his official capacity; DONALD GAIGALAS, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,

Defendants.

Argued Jan. 8, 1990

Decided July 31, 1990

As Amended Sept. 19, 1990

Carter G. Phillips, Sidley & Austin, Washington, D.C.; Robert Belknap Green, Irwin, Kerr, Green, McDonald & Dexter, Baltimore, Md., argued (Mark D. Hobson, Kevin L. Kimball, Sidley & Austin, Washington, D.C., Charles M. Kerr, Irwin, Kerr, Green, McDonald & Dexter, Baltimore, Md., Arnold Jablon, County Atty., Michael J. Moran, Asst. County Atty., Thomas K. Farley, Asst. County Atty., Baltimore County Office of Law, Towson, Md., on brief), for appellants.

William Francis Gately, Daniel Warren Whitney, Sr., Semmes, Bowen & Semmes, Baltimore, Md., argued

(Janet M. Truhe, Semmes, Bowen & Semmes, Baltimore, Md., on brief), for plaintiffs-appellees.

Before PHILLIPS and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PHILLIPS, Circuit Judge:

Baltimore County, Baltimore County Chief of Police Cornelius Behan, and Baltimore County Police Officers Donald Gaigalas and Ronald Tucker appeal the district court's judgment for David and Barbara Buffington in the Buffingtons' action under 42 U.S.C. § 1983 and state law, asserting the defendants' liability for failing to prevent the Buffington's son's suicide while he was being held in a county jail. The appellants also challenge separate orders of the district court awarding attorneys' fees to the Buffingtons and imposing civil contempt sanctions on their trial counsel. We affirm the judgments against Tucker and Gaigalas, reverse the judgments against Behan and Baltimore County, vacate and remand the award of attorneys' fees and expenses, and vacate and remand the contempt sanctions.

I

At about 4:30 a.m. on March 19, 1987, David Buffington, Jr., was awakened by the sound of his father's car pulling out of the driveway of his parents' house, next door to his. Knowing that his younger brother, James Buffington, 24, was the only person home that night, and that James did not have a valid driver's license, David rushed next door and discovered a handwritten suicide note and guns missing from his father's gun closet, which had been forced open. David immediately called the police emergency line, then set off in search of his brother. Officer Lewis Harvey of the Wilkens precinct of the Baltimore County Police Department, responding to a broadcast over the police radio describing James as suicidal, went to David's house and met David's

wife, Kathryn, who showed him the suicide note. Kathryn described James' history of emotional problems and drug and alcohol abuse, particularly as a teenager. These problems had led to a number of encounters with the Wilkens precinct police, and in fact Officer Harvey acknowledged to Kathryn that he knew of James' background. Acting Shift Lieutenant Joseph Gribbin soon arrived at the house and also read the note. Officer Harvey called the Wilkens station and advised that James was suicidal and armed.

The county police apprehended James at 5:47 a.m. When he was seized, James appeared to be intoxicated and had in his possession two rifles and three handguns, all loaded. At 6:25 a.m., Officer Harvey called Kathryn Buffington and informed her that James had been found and was being held at the Wilkens station in protective custody. He told her that James had said that he had not committed suicide "because he couldn't decide which gun to use." J.A. at 1112. David Buffington returned from his search minutes later and called Officer Harvey to confirm that James was being held and to remind him of James' history of emotional problems. David stressed his sense that James was at extreme risk of committing suicide. Officer Harvey stated that preparations were currently being made to take James to Greater Baltimore Medical Center for an emergency psychiatric evaluation. On Officer Harvey's advice, David decided to press criminal charges against his brother in order to enable the police to hold James in custody in the event that the hospital would not take him on an emergency commitment basis. At the time he spoke to David, Officer Harvey had already prepared the paperwork for arrest and charging.

From the time he was first brought into the station, Buffington was handcuffed to a rail beside the booking desk in the receiving room of the police station so he could be observed by the desk officers. Several police officers testified at trial that it was standard practice to

handcuff suicidal detainees to the rail by the booking desk rather than place them in the lockup, where they might be able, quietly and unnoticed, to hang themselves. *See, e.g.*, J.A. at 1160-63 (testimony of Officer Harvey). At approximately 6:15 a.m. that morning, Officers Donald Gaigalas and Ronald Tucker had taken over as desk officers, relieving Officers William Maeser and Patrick Kamberger from that post. Officer Gaigalas, at about 6:25 a.m., unhitched Buffington from the rail and took him to an isolation cell, without removing any of his clothing. Although there were numerous detainees in the male lockup, Gaigalas placed Buffington alone in the female lockup area, and made no provision to keep him under observation. At 7:15 a.m., Buffington was found, hanged from the cell's horizontal bars by a noose fashioned from his pants.

David and Barbara Buffington, as James' parents, and Barbara as James' personal representative, then brought this action alleging claims of constitutional violation under 42 U.S.C. § 1983, and pendent state claims under the wrongful death and survival statutes. Named as defendants were Baltimore County, Chief of Police Cornelius Behan, Sergeant Daniel Yuska, Corporal Joseph Gribbin, Captain Kenneth Kramer, and Officers Lewis Harvey, Donald Gaigalas, Ronald Tucker, and William Maeser.

There was conflicting evidence at trial about Buffington's emotional state while handcuffed to the rail and about how much the desk officers knew concerning Buffington's intention to commit suicide. Outgoing desk officer Kamberger testified that Buffington told him that he wanted to shoot himself, and Kamberger further stated that he passed this information on to Officer Tucker when Tucker and Gaigalas took over at the desk. J.A. at 1357-60. Tucker denied that Kamberger told him this. J.A. at 1391. Officer Gaigalas admitted that he knew Officer Harvey was preparing forms for Buffington's

emergency commitment. J.A. at 1412. Though he later equivocated on the point, Gaigalas admitted in original testimony that he knew Buffington was suicidal before he took him to the cell. J.A. at 1407-08. Gaigalas also admitted that a prior deposition statement that he did not know that Buffington was suicidal and was being held for emergency psychiatric treatment had been "deliberately and knowingly false." J.A. at 1406.

At trial, the Buffingtons presented expert testimony about the County's deficiencies in suicide prevention at correctional facilities. Since 1977, there had been 57 suicide attempts in the County jails, twelve of which had been "successful." Although the County had adopted in 1984 one of the nationally recognized suicide prevention standards, known as "CALEA" (Commission on Accreditation for Law Enforcement Agencies), it did not have any written policies or regulations implementing the standards. As noted, however, the department's officers did operate under a "standard order" that suicidal detainees should remain handcuffed to the rail by the front desk. The evidence at trial also showed that County police officers received no training in identifying suicidal detainees and in preventing suicide attempts. J.A. at 1627. Dr. Joseph Rowan, one of the Buffingtons' experts on jail and lockup suicide prevention, testified that "I strongly feel that this is the worst case of handling of a suicide case that I have ever seen." J.A. at 1662-63.

After a first trial ended in mistrial, a second jury found Officers Tucker and Gaigalas liable under § 1983 for deliberate indifference to Buffington's serious need for some measure of suicide prevention. The County, through its policymaker Chief Behan, and Behan himself were found liable under § 1983 on the theory that their failure to train county police officers in suicide prevention evidenced a deliberate indifference to the rights of suicidal detainees. The jury awarded a total of $185,000 in dam-

ages against the appellants.[1] Following denial of the defendants' motions for j.n.o.v. and alternatively for a new trial, the court awarded over $430,000 in attorneys' fees and costs to plaintiffs. The court also found that the defendants' attorneys' failure to produce some crucial witnesses' statements was a knowing concealment under Fed.R.Civ.P. 26(e)(2)(B), and held them in civil contempt, ordering them to pay the court almost $7,000 each.

These appeals followed.

By way of preview, in Part II we address all the appellants' challenges to the existence of any constitutional right for whose violation they could be found liable on the § 1983 claims. In Part III, we consider whether Officers Tucker and Gaigalas have raised a separate issue of their qualified immunity from § 1983 liability. Although the judgment against Tucker and Gaigalas is supported independently by the jury's finding of liability on the state law claims, Parts II and III are necessary because Tucker's and Gaigalas' liability under § 1983 has important ramifications for the award of attorneys' fees. In Parts IV and V, we address the judgments against the County and Chief Behan, respectively, on the § 1983 claims. Parts VI and VII discuss the County's and Behan's separate claims of state law immunity from the state law claims on which they were found liable. Part VIII sets out the facts relevant to the district court's award of attorneys' fees and expenses to the prevailing parties, the Buffingtons, and addresses that award. Finally, Part IX discusses the facts relevant to and reviews the district court's order holding the County's attorneys in civil contempt and imposing monetary sanctions on them.

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[1] The jury did not award recovery on the Buffingtons' claims against the precinct captain and four other police officers and rejected the claim that the County, Behan, and the precinct captain, Kramer, had participated in a conspiracy to cover-up the investigation of the suicide.

II

All the appellants challenge the primary judgments under 42 U.S.C. § 1983 on the ground that the asserted constitutional right to some measure of protection from suicide under these circumstances does not exist. Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide when the state has intervened not to enforce the criminal law, but at the request of family members to protect the person from causing harm to himself. We reject this argument.

For the proposition that Buffington had no substantive due process right to affirmative aid from the state, the appellants rely primarily on *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In *DeShaney*, the Supreme Court held that the substantive component of the fourteenth amendment's due process clause creates no affirmative obligation in the state to protect individuals from "private violence." *Id.* at 1004. The petitioners in *DeShaney* argued that it violated substantive due process for state social workers to fail to protect a child from physical abuse at the hands of his father when the workers knew of the abuse but "stood by and did nothing." *Id.* at 1007. The Court rejected the petitioners' contention, reasoning that, as a general matter, the due process clause is "not . . . a guarantee of certain minimal levels of safety and security," *id.* at 1003; it is only after the state has taken custody of a person that the due process clause imposes certain affirmative obligations of care on the state. *Id.* at 1005; *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (eighth amendment, applicable to states through the fourteenth amendment's due process clause, requires state to provide adequate medical care to prisoners where failure to do so would amount to deliberate indifference to serious medical needs); *Youngberg*

v. Romeo, 457 U.S. 307, 319, 102 S.Ct. 2452, 2459, 73 L.Ed.2d 28 (1982) (fourteenth amendment's due process clause requires state to provide involuntarily committed mental patients with "minimally adequate or reasonable training to ensure safety and freedom from undue restraint"); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (fourteenth amendment's due process clause requires state to provide medical care to injured suspects in police custody). Because the child in *DeShaney* was still in the custody of his natural father—in "the free world"—the state was under no affirmative obligation enforceable through the due process clause to protect him.

The appellants argue that under the rationale of *DeShaney*, there was no affirmative duty of care on the part of any state actor in this case because the intervention to protect Buffington was at the instance of private parties. This is a misreading of *DeShaney*. Distinguishing prior cases in which it had found affirmative constitutional duties of protection from the situation in *DeShaney*, the Court explained that in those earlier cases it was the fact of state *custody* that triggered at least some duty of care on the part of the state:

> [W]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs —e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. 109 S.Ct. at 1005-06 (citations omitted). Nothing in the Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody. Such duties have been found both where the state takes custody inci-

dent to enforcement of its criminal laws, *see Estelle*, 429 U.S. 97, 97 S.Ct. 285, and *Revere*, 463 U.S. 239, 103 S.Ct. 2979, and where the custody serves civil, regulatory purposes, *see Youngsberg*, 457 U.S. 307, 102 S.Ct. 2452. Nor do we read *DeShaney* or the other cases as implying that it is relevant to the existence of the duty whether a state or private actor brought the need for custody to the state's attention. *See Youngberg*, 457 U.S. at 309, 102 S.Ct. at 2454 (involuntarily committed mental patient's mother sought son's commitment because she was unable to care for him or control his violence). In short, we see no basis for adopting the categorical rule urged by appellants that the state owed no duty of care to Buffington under the circumstances of this case. We hold that the due process clause did impose an affirmative obligation on the state to provide some measure of care here.

That leads to the question of the nature of the duty owed. The district court instructed the jury that it could find the individual officers liable under 42 U.S.C. § 1983 for their deprivation of a constitutionally protected liberty interest if it found that they knew that Buffington was suicidal and in need of emergency intervention, but nonetheless acted with deliberate indifference in failing to take any steps to prevent the suicide. The court noted, however, liability could not be premised on a finding that these officers failed to act on a speculative suicide risk—by not screening for suicidal tendencies or taking other preventive measures—if they had no knowledge that Buffington was suicidal. This instruction defined the duty in terms of the recognized duty of care owed to pretrial detainees, and we think this was proper.

The due process clause guarantees a pretrial detainee the right to adequate medical care at least where the state's failure to provide such care would amount to deliberate indifference to a serious medical need. *See Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir.1988) (noting that the precise scope of the pretrial detainee's right to medical

care is uncertain but is at least as great as a convicted prisoner's eighth amendment right under *Estelle v. Gamble* to be free from "deliberate indifference" to "serious" medical needs). A serious psychological impairment can qualify as such a medical need. *See, e.g., Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir.1977); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir.1986); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990).

More narrowly, we have recently recognized that where police know that a pretrial detainee is on the verge of suicide, that psychological condition can constitute the kind of serious medical need to which state officials must, under the due process clause, not be deliberately indifferent. In *Belcher v. Oliver*, 898 F.2d 32 (4th Cir.1990), we found no due process violation where a pretrial detainee hung himself with his belt after police officers placed him in a jail without removing his belt or shoes. Because the plaintiff in *Belcher* had presented "no objective evidence that [he] even had a serious need for such attention . . . [to] suicidal tendencies," *id.* at 35, we held that he had not stated a claim for a violation of his substantive due process rights. In *Belcher*, we declined to impose on the police officers a duty to screen detainees for suicidal tendencies, but we did not imply that officers would have had no constitutional duty at all if they demonstrably knew or had reason to know that a suicide was imminent. Other courts of appeals have recognized this distinction and the viability of a claim for official indifference to known suicidal tendencies. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir.1988) ("custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide [but] if such officials know or should know of the particular vulnerability to suicide of an inmate," fourteenth amendment imposes duty not to act with "reckless indifference" to the risk); *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir.1989) (no duty to screen pretrial detainee for suicidal tenden-

cies, but "[t]he story might be different if the police were certain that [the detainee] would attempt suicide and just ignored it").

Whether or not the court's characterization of Buffington in the instruction as a "pretrial detainee" was strictly accurate—and we note that evidence that backup criminal charges were in place in the event Buffington could not be admitted to the hospital supports the court's characterization—it was not plain error for the court's instruction to describe the substantive due process protection he enjoyed as coextensive with that afforded a pretrial detainee. Put another way, the appellants have not suggested, and we cannot conceive of, any reason why the Constitution might forbid deliberate indifference to the serious medical needs of pretrial detainees but permit such indifference to the needs of one in custody pending emergency psychiatric care.

III

We next consider a worrisome problem arising from the confused litigation position taken by the individual officers respecting their possible entitlement in any event to qualified immunity from the § 1983 claims. Part II of the appellants' brief mentions qualified immunity for the officer-defendants, but hinges the argument wholly on the lack of a constitutional violation—it does not assert that these defendants were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. The full text of this argument states:

> Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which

> did not exist. Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

Brief of Appellants at 16-17 (citations omitted). Even under a generous reading of this argument, it does no more than assert that these individual defendants were entitled to qualified immunity because, *on the merits*, there was no constitutional violation. While the appellants' reply brief might be read as raising a distinct issue of qualified immunity, we decline to give the appellants the benefit of such a liberal reading. *See* 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 228.02[2.-1] (1990) (appellant must raise all issues he wishes to be considered in his initial brief); *Mississippi River Corp. v. FTC*, 454 F.2d 1083, 1093 (8th Cir.1972) (error relied on should not be asserted for the first time in the reply brief).

We think this the proper disposition for at least two reasons. The Buffingtons understandably did not think that the individual defendants had raised the distinct contention that they were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. Perceiving that the qualified immunity argument was simply a reformulation of these defendants' argument on the merits, the Buffiington's responded accordingly in Part II of their brief. The full text of that argument states: "Appellants next argue that '[a]bsent a constitutionally secured right, . . . the state officer may assert and prevail upon the doctrine of qualified immunity.' Appellants, however, have failed to establish the absence of such a right. Thus there is no basis for asserting this defense." Brief of Appellees at 32. In other words, the Buffingtons justifiably interpreted the qualified immunity issue raised by these defendants as simply duplicative of the merits issue, and so addressed only the merits.

More generally, the appellants' presentation of the qualified immunity defense throughout this litigation has been a chronicle of confusion and misapprehension. In their first responsive pleading, a motion to dismiss or for summary judgment, the appellants as defendants asserted "[t]hat the individual Defendants are immune with respect to the claims presented in the within Complaint." J.A. at 116. In their supporting brief, they argued that the plaintiffs had not alleged a violation of a clearly established constitutional right, because the defendants had no duty to screen for latent suicidal tendencies, as alleged. Finding that the plaintiffs had plainly alleged more than a failure to screen for latent tendencies, the court denied the motion in a memorandum and order. After denial of a motion to reconsider, the defendants sought an amendment to the court's interlocutory order to certify other questions for immediate appeal under 28 U.S.C. § 1292(b). Over a week after that motion was denied, and about a week before trial, the defendants noted an appeal from the denial of qualified immunity under 28 U.S.C. § 1291, *see Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), and moved for a stay of the impending trial. The district judge denied that motion, and Judge Winter, in chambers, also denied a motion for stay directed to him. Both judges found that the defense of qualified immunity had not been raised, and Judge Winter opined further that in any event he thought the defense inapplicable. From all indications in the record, that appeal of the qualified immunity issue was thereafter abandoned and, on the first day of trial, the deefndants filed an answer to the plaintiffs' amended complaint and finally included good faith qualified immunity as a defense distinct from the constitutional violation.

The first trial ended in a mistrial because of a hung jury. At the close of evidence in the second trial, the defendants moved for directed verdict. The court re-

served its ruling on that motion and submitted the case to the jury. The defendants requested an instruction on qualified immunity, which the court refused to give for reasons not contained in the record. The defendants/appellants have not on appeal assigned error to that refusal. After the jury returned verdicts under § 1983 against some of the individual defendants, those defendants moved for j.n.o.v., asserting, *inter alia*, in the motion itself that they were entitled to qualified immunity. In their supporting brief, however, they made no argument whatsoever on this point and made no mention of the refusal to instruct on qualified immunity. As with the refusal to give the qualified immunity instruction, the appellants have not on appeal assigned error to the denial of the motion for directed verdict or j.n.o.v.

In sum, we do not think the appellants have properly preserved and raised in this court an issue of qualified immunity distinct from the question of whether a constitutional violation occurred. We decline to consider such an issue *sua sponte*.

IV

Appellant Baltimore County argues separately that it was entitled in any event to judgment as a matter of law on the § 1983 claim against it. Specifically, the County contends that the district court erred in submitting that claim to the jury because there was no evidence that its failure to train its officers in suicide prevention proximately caused Buffington's suicide. We agree that under the Supreme Court's decision in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the judgment against the County on the § 1983 claim must be reversed.

In *Canton*, the Supreme Court outlined the circumstances under which a municipality can be held liable under § 1983 for constitutional violations resulting from a policy of failing to train municipal employees. Under

general principles of § 1983, a municipality can be liable only when the municipality itself, through one of its policies or customs, causes the constitutional violation; municipal liability cannot be premised on *respondeat superior* or vicarious liability. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691-92, 98 S.Ct. 2018, 2036-37, 56 L.Ed.2d 611 (1978). Moreover, the municipal policy or custom must be the direct cause of—the "moving force" behind—the constitutional violation. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981). The *Canton* Court, addressing the peculiar context of a claim that a municipality's policy of omission, *i.e.*, its failure to train, was the cause of the constitutional violation, considered both the degree of fault and the causal link required under § 1983 to sustain that type claim.

The Court held first that § 1983 requires a showing that the failure to train amounts to "deliberate indifference to the rights of persons with whom the police come in contact." [2] *Canton*, 109 S.Ct. at 1204. This degree of fault was thought necessary to reconcile the failure-to-train theory of liability, which alleges a policy of omission, with the principle that § 1983 municipal liability can attach only when the municipality's policy represents "a deliberate choice [by the municipality's authorized policymakers] to follow a course of action . . . made from among various alternatives." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986) (Brennan, J., plurality opinion). In addition to the "deliberate indifference" culpa-

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[2] This requirement of "deliberate indifference" arises under § 1983 itself and stands independent of any culpability requirement that may be necessary to prove the underlying constitutional violation. *Canton*, 109 S.Ct. at 1204 n. 8. This does not of course displace the firmly established rule that § 1983 contains no independent state-of-mind requirement governing the liability of the immediate wrongdoer. *See Graham v. Connor*, —— U.S. ——, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989).

bility standard, the Court explained that a direct causal link must exist between a specific deficiency in training and the particular violation alleged: "the identified deficiency in [a] training program must be closely related to the ultimate injury." *Canton*, 109 S.Ct. at 1206. The pertinent question on causation will be "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Id.* It will not

> suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.

Id.

We do not think the evidence was sufficient under *Canton* to permit a jury to find that a policy of failure to train officers in suicide prevention actually and proximately caused the particular harm that occurred here. Immediately before the suicide, Buffington was handcuffed to the rail by the precinct's booking desk, in conformance with the standard procedure used as a matter of policy for suicidal detainees at the precinct. Buffington would have remained handcuffed there until moved to the hospital but for desk officer Gaigalas's decision, unchecked by his fellow desk officer Tucker, to take him to an isolation cell without removing any of his clothing, arranging for monitoring, or taking some other preventive measure. It may well be, as the Buffngtons contend, that better suicide prevention training, closer adherence to national standards on jail suicide prevention, written regulations, or some combination of these would have served to avoid what occurred here. But *Canton* has made clear that municipal liability under § 1983 may not rest on such

proof. *Id.* 109 S.Ct. at 1206. This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following the precinct's official policy and customary practice of keeping Buffington handcuffed to the rail, *i.e.*, by showing more than the deliberate indifference that the jury found.[3] In so holding, we need not determine whether the Wilkens precinct's standards and procedures for handling suicidal detainees necessarily met constitutional standards in all possible respects. Rather, in light of *Canton*'s instruction on causation, we hold only that the normal practice of handcuffing such detainees to the rail, which was a part of those procedures, was "sufficient to equip [Gaigalas and Tucker] to avoid the particular injury causing conduct" in this case. *Canton*, 109 S.Ct. at 1206; *see Dorman v. District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989) (reversing § 1983 judgment against District of Columbia for failure to train in suicide prevention on grounds that *Canton*'s fault and causation standards were not met).

V

The judgment against Chief Behan under § 1983 must also be reversed. Behan may not be held liable for § 1983 violations for the acts of Officers Gaigalas and Tucker under a theory of *respondeat superior*. *See Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir.1977).

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[3] Indeed, the district court has held and the Buffingtons themselves, in their appellate brief, have acknowledged that it was Gaigalas's critical dereliction that directly caused this suicide. The court stated that it was not "necessary for the police officers at Wilkens Police Station to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated jail cell with his pants on. A semi-clear head and a normal degree of common sense would have sufficied." J.A. at 964-65. Similarly, the Buffiingtons' statement of facts notes that "[t]his suicide was the direct, proximate, and inevitable result of the utter failure of Gaigalas and Tucker to constantly observe James while he was in their custody." Brief of Appellees at 10.

Here, the theory of Behan's individual liability alleged and submitted to the jury was that he had authority for implementing training or other suicide prevention standards and failed to do so, directly and proximately causing Buffington's suicide. For the reasons stated in the preceding section, there was insufficient evidence that any failure to train on Behan's part caused this particular injury.

VI

The County next contends that the district court erred in holding it liable for the state law negligence claims for wrongful death and survival because Baltimore County has never waived its governmental immunity. The district court denied the County's motion for j.n.o.v. on this ground, reasoning that the County's creation of a self-insurance fund constituted a limited waiver of governmental immunity. We agree with the County that its adoption of a self-insurance fund did not operate to waive the County's governmental immunity and that the judgment against it on the state claims must therefore be reversed.

As a "home rule" county chartered under Article XI-A, § 2, of the Maryland Constitution, Baltimore County may exercise only the powers granted to such counties in the Express Powers Act, Md.Ann. Code Art. 25A (1987).[4] One such express power the County possessed at the time relevant to this case was the power to waive its governmental immunity.[5] In 1977, the County created a self-

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[4] Md. Const. art. XI-A, § 2 (1981), provides: "The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article." Pursuant to this mandate, the General Assembly enacted the Express Powers Act.

[5] Section 5(CC) of the Express Power Act authorized a charter county

> [t]o provide by ordinance or inclusion in the county charter for the waiver of sovereign immunity so that the county may be

insurance fund designed, among other things, "to pay on behalf of the county [and its employees] . . . any sum which the county [and its employees] may become legally obligated to pay for liability claims, including but not limited to personal injury and/or property damage." Baltimore County Code, § 2-131(b). The question is whether Maryland law would view this legislative action as a waiver of the County's governmental immunity.

Under Maryland law, a court may find a waiver of sovereign or governmental immunity only if "positive consent given, or by necessary or compelling implication." *Jackson v. Housing Opportunities Comm'n*, 289 Md. 118, 422 A.2d 376, 378 (1980).[6] Maryland uses a two-pronged test for determining whether the relevant legislature, be it the state's General Assembly or a county governing body, has waived sovereign or governmental immunity: "[a]n asserted waiver of immunity is ineffective 'unless specific legislative authority to sue the agency [or municipality] has been given, and unless there are funds available for the satisfaction of the judgment, or power reposed in the agency [or municipality] for the raising of funds necessary to satisfy a recovery against it.'" *Jackson*, 422 A.2d at 378-79 (quoting *Katz v. Washington*

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sued in tort actions in the same manner and to the same extent that any private person may be sued. Any chartered county [that so provides] shall carry comprehensive liability insurance to protect itself, its agents and its employees.

Md.Ann.Code Art. 25A, § 5(CC) (1987). The General Assembly has now repealed this subsection and all waivers enacted under it. Acts 1987, ch. 594, § 2. This repeal, however, is irrelevant to the waiver issue here, because the repeal applies only to actions arising on or before July 1, 1987. *Id.* § 3.

[6] Though the Maryland cases have frequently used the terms interchangeably, "sovereign" immunity refers to the tort immunity of the State and its agencies, which is total, while "governmental" immunity refers to the immunity of counties and municipalities, which turns on whether the suit is based on "governmental" or "proprietary" functions; tort immunity exists, unless waived, in the former case, but not in the latter.

Suburban Sanitary Comm'n, 284 Md. 503, 397 A.2d 1027, 1033 (1979)). Both prongs of this test must be satisfied. *Id.* at 422 A.2d at 378-80. The general rule in Maryland is that the mere procurement of liability or indemnity insurance by a governmental unit has no effect on its immunity from tort liability. *See id.* at 380; *Quecedo v. Montgomery County*, 264 Md. 590, 287 A.2d 257, 260 (1972); *Jones v. Scofield Bros.*, 73 F.Supp. 395, 398 (D.Md.1947).

The first prong of the waiver test is not met in this case, because the County has never consented to be sued. The provision for self-insurance cannot by itself support a finding of such consent. *Jackson*, 422 A.2d at 380. In the Maryland cases where waiver has been found, the legislative intent that a county or a state agency may be sued has been expressed in explicit and unmistakable language. *See, e.g., James v. Prince George's County*, 288 Md. 315, 418 A.2d 1173 (1980) (tracking language of Express Powers Act, county's charter provided "[t]he County may be sued in actions sounding in tort in the same manner and to the same extent that any private person may be sued"); *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 397 A.2d 1027 (1979) (state agency "shall be a body corporate . . . with the right . . . to sue and be sued"); *cf. O & B, Inc. v. Maryland-Nat'l Capital Park and Planning Comm'n*, 279 Md. 459, 369 A.2d 553 (1977) (legislative authorization that state agency may "sue and be sued" is not alone sufficient to find waiver of sovereign immunity). Nowhere in the language of § 2-131 has Baltimore County expressly authorized that suits may be brought against it, and the creation of the self-insurance fund cannot take the place of the necessary legislative authorization.

The district court believed that a county would not create an insurance fund to pay claims for which it might become liable unless it intended thereby to waive its immunity from all claims. This analysis is flawed in at

least two respects. First, the district court, quoting *Jackson*, 422 A.2d at 382, stated that "a legislative mandate to carry liability insurance is a strong indication of legislative intent that sovereign immunity is waived to the extent of the insurance." On that basis, the court found that the County had effected "a limited waiver of sovereign immunity." [7] This reasoning, however, ignored the context of the Court of Appeals' statement in *Jackson*. In that case, the court had already concluded that the first prong of the immunity waiver test was satisfied by language in Md.Ann.Code Art. 44A, § 8(a) stating that the housing authority has power "[t]o sue and be sued." *Id.* 422 A.2d at 379. The quoted language from *Jackson* was stated in the context of considering whether, notwithstanding the express provision for suits, the particular insurance provision in that case sufficed under the second prong of the waiver inquiry. *Id.* at 381-82.

Second, the district court's premise that a county would not insure itself unless it had waived its governmental immunity reflects a misapprehension of the nature of the county's pre-existing immunity. Though counties in Maryland are immune, absent waiver, from suits based on actions taken in the exercise of their "governmental" functions, they are not immune from suits alleging conduct in the exercise of "proprietary" functions.[8] *Austin*

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[7] If the district court had been correct that the waiver of immunity accomplished by this enactment was "limited," the waiver would have violated the Express Powers Act. A chartered county's waiver of governmental immunity under that Act is ineffective if "limited." *See Prince George's County v. Fitzhugh*, 308 Md. 384, 519 A.2d 1285 (1987).

[8] The Buffingtons have not argued that the County's conduct in this case could qualify as a "proprietary" function, and we express no opinion on the proper characterization. *See Austin*, 405 A.2d at 272 (distinction between "governmental" and "proprietary" functions "is probably one of the most unsatisfactory known to the law" (quoting 3 K. Davis, Administrative Law Treatise, § 25.07, at 460 (1958)).

v. City of Baltimore, 286 Md. 51, 405 A.2d 255, 256 (1979). It would certainly be permissible to infer that the County's creation of the self-insurance fund was motivated by a need to fund liabilities arising from suits based on "proprietary" functions. This inference is supported by the fact that the County enacted § 2-131 under the express power conferred by Md.Ann.Code Art. 25A, § 5(S) (1987), which permits amendment of the county charter, rather than under the now-repealed express power in § 5(CC) to waive immunity. In short, apart from its failure to meet the first prong of the immunity test, the provision for the insurance fund, viewed in context, contains no necessary or compelling implication of waiver of governmental immunity.

We hold that Baltimore County was immune from the state law claims alleged in this case and that the judgment against it on those claims must be reversed.

VII

We also agree with Police Chief Behan that the judgment against him on the state law claims for wrongful death and survival must be reversed. The district court erred in denying his motion for directed verdict or j.n.o.v., made on the ground that Maryland law provided him with public official immunity from the state law claims.

A government official in Maryland is entitled to public official immunity if "(1) the individual actor, whose alleged negligent conduct is at issue, is a *public official* rather than a *mere government employee or agent;* and (2) his tortious conduct occurred while he was performing *discretionary*, as opposed to *ministerial*, acts in furtherance of his official duties." *James v. Prince George's County*, 288 Md. 315, 418 A.2d 1173, 1178 (1980) (em-

phasis in original). It is not contested that Behan qualifies as a "public official" under the first prong of the test. *See Duncan v. Koustenis*, 260 Md. 98, 271 A.2d 547 (1970) (among the factors to be considered are whether the individual has ongoing responsibilities, performs an important public duty, and exercises some portion of the government's sovereign power). Rather, the parties disagree over whether the acts subjecting Behan to state law liability were "discretionary" or "ministerial."

The Buffingtons' state law claims against Behan alleged, *inter alia*, that his negligent failure to train, supervise, or otherwise guide the conduct of individual police officers in handling of suicidal detainees caused James Buffington's suicide. Implicit in this allegation, and in the related allegation that Behan was a policymaker for the purposes of imposing § 1983 liability on the County through him, is the recognition that Behan had discretion to implement more effective suicide prevention standards than he did.[9] It is precisely his failure to exercise available discretion that forms the basis of the state law claims against him. This type of failure, however, is the prototypical "discretionary" choice of a policymaking public official that the state law imunity protects. *See Restatement (Second) of Torts* § 895D comment f (1979).

The Buffingtons contend, consistent with the district court's analysis, that because Chief Behan had adopted, at least nominally, the CALEA national standards for jail suicide prevention, his duty to see these standards rigidly maintained involved performance of only a ministerial duty. While it is certainly true that discretion means only the " 'freedom to act according to one's judg-

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[9] Throughout their appellate brief, the Buffingtons ackowledge the breadth of Behan's authority as the police department's policymaker. *See, e.g.*, Brief of Appellees at 15 n. 8 ("Chief Behan has the final say in determining the rules and regulations of the department.").

ment in the absence of a hard and fast rule,'" *James*, 418 A.2d at 1179 (quoting *Schneider v. Hawkins*, 179 Md. 21, 16 A.2d 861, 864 (1940)), the CALEA standards did not have the force of law in Baltimore County and were not binding on Behan's discretion to shape department policy on suicide prevention; indeed, the Buffingtons specifically complain about the *lack* of any written regulations governing suicide prevention. As the official who adopted the CALEA standards, Behan would presumably have had the discretion to modify or even abandon them, at peril, as always, of liability for any resulting violations of federal constitutional rights. As Behan's state law liability was founded on discretionary acts, the judgment against him on the state law claims is reversed.

VIII

The appellants also challenge a separate order of the district court awarding the prevailing plaintiffs $430,658.78 in attorneys' fees and costs under 42 U.S.C. § 1988.[10] Because we have altered the disposition of some of the § 1983 claims, we must remand the award of fees and costs to the district court for reconsideration in light of the Buffingtons' now more limited success. *See Lenard v. Argento*, 699 F.2d 874, 898 (7th Cir.1983). We think it appropriate, however, to discuss some of appellants' specific challenges to the award as it came to us, and some principles of § 1988 fee awards applicable in the present posture of this case, to guide the district court's exercise of discretion on remand. *See id.; Muscare v. Quinn*, 680 F.2d 42 (7th Cir.1982).

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[10] Title 42 U.S.C. § 1988 provides, in relevant part: "In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

A

In their unsupplemented motion for attorneys' fees, the plaintiffs requested that the "lodestar" [11] calculation of the fees for their lawyers—members of the Baltimore firm of Semmes Bowen & Semmes—and two paralegals be made as follows: for lead counsel and senior partner William Gately, 893.7 hours at an hourly rate of $175; for partner Daniel Whitney, 1,150.6 hours at an hourly rate of $135; for associate Janet Truhe, 281.5 hours at an hourly rate of $120; for associate Denise Grieg, 36 hours at an hourly rate of $70; and for paralegals Nancy Kozak and Amy Dagold, 202.4 and 2.6 hours, respectively, both at an hourly rate of $58. The total fee requested under this calculation was $359,918.50. The district court modified this request in only a few minor respects. Though the court rejected challenges to the hourly rates submitted for Gately and Whitney and the paralegals (the rates for Truhe and Grieg were not challenged), it reduced the hours expended. First, it noted 26 billing entries, totalling 4.55 hours, designated "Telephone conversation with judge or judge's staff." The court noted that these conversations were probably with the chambers law clerk, and because, it reasoned, that clerk would not have spoken more than six minutes at any one time, each of the 26 entries should have been for no more than 0.1 hours. The court thus reduced those 4.55 hours to 2.6. J.A. at 936-37. The court also noted that certain of the interrogatories were substantially similar, "which raise[d] the spectre of duplicity [sic]," J.A. at 939, and accordingly reduced the 14.65 hours spent on them to 8. Finally, the court was

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[11] The "lodestar" figure represents "the number of hours reasonbly expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). This figure will normally represent the reasonable fee contemplated by § 1988, though in cases of "exceptional success" an upward adjustment may be appropirate, or in cases of partial or limited success some reduction may be in order. *Id.* at 435, 103 S.Ct. at 1940.

troubled by the numerous billing entries generically describing the billed time, *e.g.*, "legal research regarding substantive issue." Though admitting that the billing sheets gave the court no basis for evaluating the reasonableness of a very substantial portion of the requested hours, it found that "almost all of what counsel did was reasonable" because they "left no stone unturned in proving [the] case and in providing the Court with pertinent authority." J.A. at 944. Nonetheless, the court followed the approach used in *Spell v. McDaniel*, 616 F.Supp. 1069 (E.D.N.C.1985), *aff'd in part, vacated in part*, 824 F.2d 1380 (4th Cir.1987), and made an "across-the-board" 5% reduction in the hours expended on the ground of inadequate documentation. After these modest reductions, the court awarded $340.739.60 of the $359,918.50 sought in this unsupplemented petition. The court also approved all of the $71,513.70 sought as expenses, $39,470.68 of which was spent on four expert witnesses.

The court dealt separately with a supplement to the motion for attorneys' fees covering fees and expenses incurred after the submission of the initial motion. This supplement requested an additional $20,383.48 for work in connection with the response to defendants' motion for j.n.o.v. and the preparation of the fee petition. At the same hourly rates, the court approved Gately's requested 30 hours, but reduced Whitney's 58.6 hours by 10 hours, Truhe's 47.5 by 5% (to 42.75 hours) and paralegal Kozak's 3.3 to 2.3 hours. The resulting reply fee awarded was $17,074.40. The court did not alter the $1,331.08 requested for "reply expenses" of copying, use of Westlaw and Lexis, and word processor time. The total award, after supplementation, of $430,658.78 thus comprised $357,814.00 for attorneys' fees and $72,844.78 for expenses.

B

The most significant issue the district court will have to consider on remand is whether the now unsuccessful

claims against Chief Behan and Baltimore County were sufficiently unrelated to those against the individual officers that the hours expended in pursuit of the former claims must be excluded in the fee award calculation. *See Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983). In *Hensley*, the Supreme Court admonished district courts that where a plaintiff brings in a single lawsuit "distinctly different claims that are based on different facts and legal theories," work on unsuccessful claims cannot be thought to have contributed to the ultimate result and must be excluded from the fee award. *Id.* As discussed, the successful claims against the two individual police officers involved allegations of deliberate indifference to a particular, known, serious need for psychiatric care, and focused exclusively on the officers' conduct at the booking desk in the early morning of March 19, 1987. The ultimately unsuccessful claims against Chief Behan and the County, on the other hand, rested on what appears to us to have been altogether separate conduct—that of failing, over a number of years, to train police officers and equip the Wilkens precinct to handle the recurring problem of suicidal detainees. In other words, the legal theories of a county's custom and policy of indifference to suicidal detainees and the facts needed to prove them might arguably be thought formally unrelated to the facts and theories on which Gaigalas and Tucker were held liable. Nonetheless, we decline to make a first instance assessment of the relatedness of these claims, in light of the Supreme Court's direction that the calculation of a fee award, including questions of the relatedness of multiple claims, lies primarily within the district court's equitable discretion. *Id.* at 436-37, 103 S.Ct. at 1941-42. If the district court determines that the unsuccessful claims against Chief Behan and the County were indeed unrelated to the successful ones, the burden of showing which hours are recoverable for work on the successful claims will of course rest with the fee applicant, and the court is entitled to

expect that the applicant's time records will provide some guidance in identifying the recoverable hours. *Id.* at 437, 103 S.Ct. at 1941 (plaintiff's counsel "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.").[12]

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[12] The appellants object on various grounds to the award of expenses for some of the plaintiffs' expert witnesses. If the district court determines on remand that the claims against Behan and the County were distinct from the successful ones, it should give careful consideration to which, if any, of these experts' expenses should be awarded.

In this connection, we note that the testimony of two of the experts, Joseph Rowan and George Kirkham, appears to have related exclusively to the unsuccessful theory that the police chief's and County's failure to maintain suicide prevention standards was the deliberate indifference that caused the suicide. A third reimbursed expert, Lindsay Hayes, never testified but advised the plaintiffs on the same subject matter. The fourth expert, Robert DiGrazia, a veteran in the field of police administration, testified to the deficiencies in the police's internal "command" investigation of Buffington's suicide. His testimony therefore related to the conspiracy/coverup theory on which the plaintiffs did not prevail at trial. The district court, however, rejected the argument that those particular unsuccessful claims were wholly distinct from the others against the County and Behan and accordingly refused to exclude attorneys' fees and expenses relating to them. Our disposition of the claims against the County and Behan will obviously necessitate reconsideration of the award for DiGrazia's expenses, which related to unsuccessful claims previously found to be intertwined with the now unsuccessful custom and policy claims against the County.

Though the district court should reconsider the relatedness of the claims and the award of expert fees, it need not revisit the argument, correctly rejected by the court and renewed by appellants here, that fees and expenses attributable to the first trial, which ended in mistrial, should be excluded on the ground that the plaintiffs did not prevail in that proceeding. Section 1988 rewards a plaintiff who ultimately prevails—who wins the war—without deducting for lost battles along the way. *See Spell v. McDaniel I*, 824 F.2d 1380 (4th Cir.1987) (approving lodestar that included hours spent on the first trial, even though second trial on damages was granted).

In the event that the district court decides that the unsuccessful claims are "inextricably intermingled" with the successful ones, *see Plyler v. Evatt*, 902 F.2d 273, 280 (4th Cir.1990), the court should undertake a renewed assessment of the "significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. Although the court earlier found that the plaintiffs were entitled to a fully compensatory fee because their attorneys achieved an excellent result, this conclusion rested substantially on the judgment that "two of the defendants who lost—Chief Behan and Baltimore County —were the most important." J.A. at 943. We anticipate that, if the court does not determine that the claims against Behan and the County were distinctly different, its assessment of the ultimate result of the litigation will nonetheless be substantially affected by our disposition of those claims. We doubt that, in these changed circumstances, a fully compensatory award would be appropriate, but as with the preliminary question of the relatedness of the claims, the district court should make the judgment on that question in the first instance, with close attention to "the relationship between the amount of the fee awarded and the results obtained," *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941, and the need for a "clear explanation" of that relationship as perceived by the court, *id.*

C

The appellants have also challenged the hourly rates awarded the two lawyers who served as the Buffingtons' lead counsel, David Gately and Daniel Whitney. In the course of reconsidering the fee award on remand, the district court should revisit this challenge, with due regard for the following observations.

As part of his broad oversight of the case, Gately developed the plaintiffs' strategy and tactics, took numerous depositions, and examined most of the witnesses

at trial. Whitney was primarily responsible for pleadings, papers, and legal research, but also handled the presentation of the plaintiffs' expert witnesses and developed the claims against the County and its policymakers. As noted, the court set the hourly rates for Gately and Whitney at $175 and $135 per hour, respectively. Both men were partners in the prominent Baltimore law firm of Semmes Bowen & Semmes and had extensive litigation experience, but no experience in civil rights litigation, apparently having become involved in this case because David Buffington, James' father, was also a partner in that law firm.

The district court should reconsider whether the hourly rates for these attorneys comport with the underlying purpose of the Civil Rights Attorney's Fees Awards Act of 1976, which was to establish a fee-shifting regime that would enable civil rights plaintiffs to gain effective access to the federal courts. *See Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 731 n. 12, 107 S.Ct. 3078, 3089 n. 12, 97 L.Ed.2d 585 ("'[A]n attorney's fee award should be only as large as necessary to attract competent counsel'") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir.1986)). Without implying any impropriety, we think it a relevant inquiry whether but for the unusual circumstance that found the decedent's father a partner in this law firm, these particular lawyers of undoubtedly great general competence would have been retained to handle this action, given their inexperience in the complexities of § 1983 litigation. While there is affidavit evidence that Gately's and Whitney's hourly rates were in line with market rates charged private clients for complex civil litigation in the Baltimore community, the affidavits do not provide specific information about market rates in Baltimore for comparable civil rights cases. *See Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 737 (11th Cir.1988) (noting that the "market rate for federal civil litigation is too overinclusive" for setting hourly rates under § 1988). We

are unable to tell from the district court's memorandum opinion whether the hourly rates for Gately and Whitney were influenced by the fact that, as partners in a leading local firm, they customarily billed at the high end of the private market rates; such a factor would be impermissible under the Supreme Court's direction in *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984), that private firms and nonprofit legal service organizations should be treated equally in setting hourly rates under § 1988. *See Norman v. Housing Authority*, 836 F.2d 1292, 1305 (11th Cir.1988) ("While it is no doubt true that law firms of established lineage and reputation can charge substantial fees, that is not really the question."); *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir.1987) ("there . . . comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries.").

Here, the district court accepted as reasonable under § 1988 the proffered rates that these two skilled attorneys charged in other civil litigation matters. These rates should not have been mechanically accepted in the absence of more specific corroborating evidence of rates charged for civil rights litigation in the Baltimore community. *See Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1161 (8th Cir.1985) (an attorney's own billing rate is not a reliable measure where he does not specialize in the area of law that is the subject matter of the lawsuit). In *Spell v. McDaniel I*, 824 F.2d 1380, 1402 (4th Cir.1987), we noted that hourly rates could be proved by "affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market." We did not imply, however, that the rates charged by a private attorney without civil rights ex-

perience could be determinative of a § 1988 hourly rate without some other evidence corroborating those rates as reasonable for § 1983 litigation in the relevant community. The Supreme Court has strongly intimated that the primary justification for awarding high-end hourly rates for experienced counsel in § 1983 litigation is that their very experience and skill will result in economies of time because of their lack of need for extensive background legal research. *Blum*, 465 U.S. at 898, 104 S.Ct. at 1548. Where, as here, counsel is indeed experienced in general but not in the special field of civil rights litigation, that justification may upon careful analysis be found lacking. Here as a matter of fact the record at least suggests the likelihood that an inordinate amount of legal research effort was necessitated by these undoubtedly fine lawyers' lack of specific experience in this field.[13]

In conclusion of this issue, we reiterate that we are mindful of the necessity of—and sound policy reasons for—according substantial deference in § 1988 fee matters to the discretion of the district court, which has "close and intimate knowledge of the efforts expended and the value of the services rendered." *McManama v. Lukhard*, 616 F.2d 727, 729 (4th Cir.1980); *see Hensley*, 461 U.S. at 436-37, 103 S.Ct. at 1940-41. In exercising that dis-

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[13] By way of illustration, we note that the district court credited over 300 hours for legal research performed by two associates who assisted Gately and Whitney. Although the district court observed that this case was largely fact-intensive, it approved the more than 300 hours of associates' research, in addition to the substantial research performed by Whitney, on the ground that "legal research is necessary to master the vermiform aspects of § 1983." J.A. at 939. The district court should reconsider on remand whether these were hours reasonably expended in light of plaintiffs' choice not to retain counsel with experience in civil rights litigation. *Cf. Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939 (counsel for the prevailing party should use the same "billing judgment" he would use in the private sector and "make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."); *Spell v. McDaniel II*, 852 F.2d 762, 768-70 (4th Cir.1988).

cretion on remand, the district court should attend to the informing legal principles on exclusion of hours for unsuccessful distinct claims or reduction based on limited overall success, relevant market hourly rates in civil rights cases, and the attorneys' use of private-sector quality "billing judgment."

IX

Finally, the appellants challenge an order of the district court holding their trial counsel in contempt for violating a court order requiring production of several witness statements. As explained more fully below, the court appointed a private prosecutor after the conclusion of the second trial to investigate the possibility of bringing criminal contempt charges against Baltimore County Attorneys John Austin and James Beach for their refusal to produce certain crucial witness statements. Though the court later denied the private prosecutor's application for a show cause order under Fed.R.Crim.P. 52(b), thus aborting the criminal investigation, it held Austin and Beach in civil contempt and imposed sanctions under Fed.R.Civ.P. 37(b)(2)(D) and the court's inherent authority. The court ordered Austin and Beach each to pay to the clerk of the court $6,785.37, an amount representing a quarter of the costs incurred in the private prosecution. On appeal, the appellants contend that these sanctions were in substance based on a finding of criminal contempt made without the necessary procedural requirements. We agree with the appellants that the order imposing sanctions must be vacated and remanded.

A

In December 1987, shortly after the filing of the complaint, the Buffingtons served on the County a request for production of documents. The following requests are relevant here:

2. Any and all documents concerning or relating to the arrest, booking, detention, and death of James E. Buffington.

3. Any and all documents concerning or relating to any investigation by the Baltimore County Police department as to the death of James E. Buffington.

. . . .

19. Any and all documents concerning or relating to any oral or written statement given by any witness to the arrest, booking, treatment, incarceration, or death of James E. Buffington.

20. Any and all written or recorded statements given by any witness to the arrest, booking, treatment, incarceration or death of James E. Buffington.

21. Any and all documents, reports, and other printed or written materials concerning or relating to each individual who was detained, arrested, or incarcerated at the Wilkens Avenue Police Station lockup facility from 12:01 p.m. on March 18, 1987 through 10 a.m. on March 19, 1987.

J.A. at 979-80.

In a February 17, 1988, order, the district court denied the County's motion for a protective order and ordered production of all requested documents. The County then answered the documents request, stating that it was producing or had already produced all responsive documents and that it "reserve[d] the right to supplement this answer in the event additional documents and/or tangible property requested herein are discovered or becomes [sic] available." J.A. at 459.

Concerned about some evidence presented at the first trial, County Attorney James Beach asked the police department to reopen their earlier command investigation to the extent of locating and interviewing the detainees at the Wilkens precinct on the morning of the Buffington

suicide. During the renewed investigation, seven detainees were interviewed, and four gave taped statements that, contrary to police testimony at the first trial, Buffington was not docile and calm while being held, but was instead screaming and openly threatening suicide. County Attorneys Austin and Beach received transcribed copies of these statements before the second trial, but did not supplement their earlier response to the document request with these statements.

At the second trial, several police officers again testified that James was docile while in custody at the station. This testimony supported the defendants' argument at trial that the individual defendant officers could not have known that Buffington was about to commit suicide. During trial, plaintiffs' counsel learned of the possible existence of the detainees' contradictory statements and pointedly asked Austin about them. Austin stated only that he would "look into the matter." On the day after the jury returned its verdict, plaintiffs' counsel demanded that Austin and Beach produce any detainees' statements they might have in their possession. The next day, after further demand, Austin and Beach finally produced the seven witness statements obtained in the internal investigation.

On February 9, the Buffingtons filed a motion for sanctions against Austin and Beach. The Buffingtons asserted that the refusal to produce the witness statements was a violation of the court's February 17, 1988, discovery order and that the statements would have had a significant impact on the jury's consideration of possible punitive damages, none of which were awarded. Acknowledging that "[t]he normal remedy for a party aggrieved by opposing counsel's concealment of material evidence is to move for a new trial," J.A. at 458, the Buffingtons nonetheless declined to seek a new trial to prove punitive damages. Instead, they argued the court to impose sanctions

on Austin and Beach pursuant to a finding of criminal contempt or, in the alternative, civil contempt because "failure to impose an appropriate fine would only encourage Baltimore County and its counsel to flout court orders and hide evidence in future litigation." *Id.*

The district court considered the suggestion of criminal contempt to have merit and, following the procedure outlined in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 801, 107 S.Ct. 2124, 2134, 95 L.Ed.2d 740 (1987), initially referred the matter to the United States Attorney for the District of Maryland. After the U.S. Attorney declined to prosecute, the court, citing *Young*, appointed a private prosecutor on March 9. The court later granted the private prosecutor's motions, made under seal, for an order to take depositions, Fed.R. Crim.P. 17(f), and for early production of documents, Fed.R.Crim.P. 17(c), and denied Austin's and Beach's motions to quash subpoenas. On May 23, the private prosecutor filed under seal an application for an order under Fed.R.Crim.P. 42(b) requiring Austin and Beach to appear and show cause why they should not be held in criminal contempt. The proposed order specified the conduct alleged to constitute criminal contempt under the federal criminal contempt statute, 18 U.S.C. § 401. The district court held a hearing on the application for the show cause order on June 9. On June 26, the court denied the application, bringing to a halt the criminal contempt proceedings.

On the same day, however, the court issued an order granting the Buffingtons' motion for sanctions pursuant to a finding, "[b]y clear and convincing evidence," J.A. at 1009, of civil contempt. The court held Austin and Beach in contempt for violating the February 17, 1988, discovery order by failing to supplement their response to the documents request with the later-discovered witness statements. The court reasoned that Fed.R.Civ.P.

26(e)(2)(B)[14] imposed on Austin and Beach an obligation under the circumstances to supplement their earlier response. Drawing a "weighty inference of knowing concealment from the sheer importance of these witness statements to the issues at trial," J.A. at 1001, the court found the failure to supplement to constitute a violation of Rule 26(e)(2)(B) and the court's February 17 order. Citing its authority under Fed.R.Civ.P. 37(b)(2)(D) to issue a contempt order for failure to obey a court order and its inherent authority to control discovery, the court held Austin and Beach in civil contempt.[15] The sanction

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[14] Fed.R.Civ.P. 26(e)(2)(B) provides, in pertinent part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except . . . [that a] party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

[15] The court's attempt to invoke Rule 37(b)(2) as a source of its authority to sanction this conduct was inappropriate, but its alternative reliance on the court's inherent power to control discovery was proper. Rule 37(b) sanctions apply only to violations of a court order to permit or provide discovery, or one in regard to a discovery conference. They do not apply to a violation of the duty, arising in limited circumstances under Rule 26(e), to supplement a discovery response. *See, e.g., Outley v. City of New York*, 837 F.2d 587, 589 (2d Cir.1988). The February 17 order in this case did not impose a duty to supplement the earlier response to the documents request, though the order could have so provided. *See* Fed.R.Civ.P. 26(e)(3); *United States v. IBM Corp.*, 83 F.R.D. 92, 96 (S.D.N.Y. 1979). Rather, the duty to supplement arose, if at all, under Rule 26(e)(2)(B). Because Rule 37 sanctions are not available to sanction violations of Rule 26(e), courts and commentators have recognized that reliance on the inherent power of the court to sanction violations of this discovery rule is fitting. *See Outley*, 837 F.2d at 589; *Bradley v. United States*, 866 F.2d 120, 124 n. 6 (5th Cir.1989) (power to sanction for violation of Rule 26(e) either implicit in rule or derived from court's inherent power); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th

imposed on each attorney was a fine of $6,785.37, payable to the clerk of the court, representing one-fourth of the costs incurred in the private prosecutor's truncated investigation.[16] The court characterized this sanction as "strictly compensatory." J.A. at 1009.

B

The appellants contend that the district court's ruling was in substance a finding of criminal contempt and that the sanctions are invalid because they were imposed without the procedural protections required for a criminal contempt finding. We agree, and accordingly vacate and remand the order imposing sanctions.

The first issue in reviewing a contempt sanction is whether the contempt sanction is properly characterized as civil or criminal, as this determination may bear on the type of notice required, the applicable standard of proof, and other issues. *Smith v. Sullivan*, 611 F.2d 1050, 1052 (5th Cir.1980). A district court's description of a contempt sanction as either civil or criminal is not determinative and must be scrutinized independently by the appellate court. *See Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). Although the distinctions between civil and criminal contempt often become blurred when applied to par-

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Cir.1980) ("Few would question a court's inherent power to discipline breaches of Rule 26(e), even in the absence of a court order"); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2050, at 325-26 (1970) ("In the absence of a rule speaking to the question [of sanctions for Rule 26(e) violations], reliance must be on the inherent power of the court.").

[16] The Administrative Office of the United States Courts has adopted a policy of reimbursing attorneys appointed as private prosecutors in contempt actions. *See Young*, 481 U.S. at 806 n. 17, 107 S.Ct. at 2137 n. 17. The district court was aware of this policy and noted that half of the prosecutor's fees in this case would come from that source.

ticular cases, they are clear enough in the abstract: When the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct, the contempt is criminal. *See United States v. United Mine Workers*, 330 U.S. 258, 302-04, 67 St.Ct. 677, 700-02, 91 L.Ed. 884 (1947); 3 C. Wright, *Federal Practice & Procedure: Criminal 2d* § 704, at 823-24 (1982). In treating a particular contempt sanction as civil or criminal, "the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks v. Feiock*, 485 U.S. 624, 631, 108 S.C.t 1423, 1429, 99 L.Ed.2d 721 (1988). In *Hicks*, the Supreme Court clarified "a few straightforward rules" for ascertaining "the character of the relief":

> If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt.

Id. at 631-32, 108 S.Ct. at 1429-30 (citations omitted).

The contempt sanction in this case was punitive—a fine payable to the court, not conditioned on compliance with a court order. (As the court noted, compliance with the discovery order, or, more precisely, the duty to supplement arising under Rule 26(e), had now become impossible.) There is no doubt that the district court can impose a fixed, monetary, civil contempt sanction to compensate for losses sustained by violation of a discovery order or of Rule 26(e). Fed.R.Civ.P. 37(b)(2) (discovery order violation); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (same); *Perkinson v. Gilbert-Robertson, Inc.*, 821 F.2d 686 (D.C. Cir. 1987) (Rule 26(e) violation). In such cases, however, the sanctions are payable to the complaining adverse party, and the amount is determined by losses flowing from expenses incurred as a result of the violation. The relief in this case, however, was not tailored to compensate the complaining party—the Buffingtons—for any losses incurred by them as a result of the defendants' failure to comply with their duty to supplement their earlier response to the court order. Rather, it compensated for half of the expenses incurred in the court's effort to "vindicate its authority" by setting in motion, the private prosecutor's investigation and was payable directly to the court. *See Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 779 (9th Cir.1983) (judgment of contempt was criminal where fine paid to court had purpose of punishing plaintiff for completed acts of disobedience in failing to return confidential documents). The fact that this punitive fine had the incidental effect of compensating for the costs of prosecuting the violation is neither surprising nor determinative of its character. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911) ("It is true that either form of [sanction] has also an incidental effect" that can be viewed as promoting the purpose of the alternative form of sanction).

We derive our conclusion that requiring contemnors to fund their own halted criminal contempt prosecution constitutes a punitive, criminal sanction, imposed as an incident of the court's effort to vindicate its authority, from the nature of the relief itself. *See Hicks*, 485 U.S. at 636, 108 S.Ct. at 1432. Moreover, the substance of the proceedings and the court's express statement of its reason for imposing sanctions corroborate this conclusion. *See id.* at 635, 108 S.Ct. at 1431 ("the purposes that lie behind the particular kinds of relief are germane to understanding their character."). It is undisputed that the contempt proceedings were initiated to vindicate the authority of the court and to punish the actions of the alleged contemnors. *See, e.g.*, J.A. at 797 (letter of district court seeking appointment of U.S. Attorney stating that "[w]hile reviewing the matter, the prosecutor's duty is clear. He 'is appointed solely to pursue the public interest in vindication of the court's authority'" (quoting *Young*, 481 U.S. at 804, 107 S.Ct. at 2135)). Nor is there any dispute that the "substance of the proceeding[s]," *Hicks*, 485 U.S. at 631, 108 S.Ct. at 1429, as they progressed through the early stages of investigation, was criminal—the private prosecutor had obtained discovery authorization under rules of criminal procedure and had reached the stage of applying to the court for a show cause order, pursuant to Fed.R.Crim.P. 42(b). That application was denied on the same day that the court issued its order holding Austin and Beach in contempt.[17] Furthermore the district court's statements of its reasons for imposing the sanctions discloses a predominately punitive intent, consistent with the nature of the relief actually imposed—an unconditional

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[17] Because the proceedings were criminal in nature until the court's denial of the application for the show cause order and concurrent imposition of "civil" sanctions, there is no merit to the Buffingtons' contention that the appellants failed to preserve their objection to the lack of criminal contempt procedural protections. The denial of those protections first occurred when the sanction was imposed, at which point this appeal was noted.

fine payable to the court: "In this case, as well as in future cases where counsel do not comply with an order requiring production of documents, counsel can ultimately produce one of two things: the documents or a negotiable instrument payable to the Clerk of the Court." J.A. at 1008. We hold, therefore, that the district court imposed a criminal contempt sanction in this case.

C

The Buffingtons argue that if we hold, as we have, that these contempt sanctions were criminal, we could nonetheless affirm them because the district court substantially complied with the procedural protections necessary for a judgment of criminal contempt. We disagree. Regardless of whether Austin and Beach had sufficient notice of the charges and the institution of a criminal contempt proceeding, there is no indication in this record that they ever had or waived a hearing on the charges. *See In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) (party charged with contempt has constitutional right to be heard by way of defense or explanation); *Yates v. United States*, 316 F.2d 718, 725 (10th Cir. 1963) (right to hearing may be waived). The June 9 hearing on the private prosecutor's application for a show cause order does not satisfy this requirement.[18] Most fundamentally, however, the criminal contempt finding here is flawed because it was based only on "clear and convincing evidence." J.A. at 1009. A finding of criminal contempt must be based on proof beyond a reasonable doubt. *Hicks*, 485 U.S. at 632, 108 S.Ct. at 1430.

D

Although we agree with the appellants that the contempt sanctions imposed in this case were criminal in nature and must be vacated because they were not imposed under proper procedures, we reject the appellants'

[18] The contents of this closed hearing have never been transcribed.

alternative argument that the district court erred in imposing any sanction because no obligation to produce the witness statements existed. As we understand their argument, the appellants' first contention is that the February 17 order did not obligate them to produce the later-created witness statements. But, as noted, *see supra* n. 15, sanctions for a violation of Rule 26(e) may be imposed under the court's inherent power even though no order compelling the discovery was violated. Appellants' next point—that they did not breach any duty created by Rule 26(e)—deserves little attention. There was no clear error in the district court's subsidiary factfindings that Austin and Beach had possession of the detainees' witness statements before the second trial and that the refusal to apprise the Buffingtons of those critical statements permitted drawing the "weighty inference of knowing concealment." [19] Accordingly, the district court did not abuse its discretion to the extent that it found a sanctionable violation of Rule 26(e)(2)(B).

Any monetary sanction the court might impose on remand without reinstituting criminal proceedings must be civil in character: it must be designed to compensate the complaining party—the Buffingtons—for losses they incurred as a result of the violation of the discovery duty. Of course, any compensatory sanction payable to the Buffingtons must not overlap with the district court's award of attorneys' fees and expenses, a matter that must also be addressed on remand. Any reinstituted criminal contempt proceedings must of course comply with the requisites of the Federal Rules of Criminal Procedure and

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[19] The appellants' highly debatable assertion that the Buffingtons could have found and interviewed these detainee-witnesses themselves is irrelevant to whether they breached their duty under the discovery rules. The further contention that these witness statements obtained in an internal police investigation were protected work product is equally meritless. *See, e.g., Mercy v. County of Suffolk*, 93 F.R.D. 520, 522 (E.D.N.Y.1982) (work product doctrine does not apply to statements made in internal police investigation).

the constitutional protections afforded defendants in such proceedings. *See Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); 3 C. Wright, *supra*, §§ 709-14.[20]

X

For the foregoing reasons, we affirm the judgments against Officers Tucker and Gaigalas, reverse the judgments against Chief Behan and Baltimore County on both the § 1983 and state law claims, vacate and remand the award of the Buffingtons' attorneys' fees, and vacate and remand the contempt sanctions against County Attorneys Austin and Beach.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

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[20] A renewed prosecution of Austin and Beach would not raise double jeopardy concerns. Jeopardy did not attach in the prior proceedings because neither a jury was impanelled, the point at which jeopardy attaches in a jury trial, nor evidence heard, the point at which jeopardy attaches in a bench trial. *See Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
JOSEPH C. HOWARD
United States District Judge

February 27, 1989

William F. Gately, Esq.
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Re: Buffington v. Baltimore County
Civil No. JH-87-3284

Dear Counsel:

Pending before the Court is defendants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict (Paper No. 84). Plaintiffs lodged an opposition (Paper No. 88) and the matter is ripe for disposition. No hearing is necessary. Local Rule 6(E).

Upon consideration of the papers, the Court denies defendants' motion. This "letter order" *constitutes the order from which defendants can take an appeal.* Accordingly, pursuant to Fed. R. App. Proc. 4(a)(4), defendants have thirty (30) days from the date this order is entered on the docket, which should be accomplished by tomorrow, Tuesday, February 28, to file their notice of appeal.

While the appeal is being effected, including the preparation of the trial transcripts, the Court will rule on the Motion for Attorneys' Fees and the Motion for Sanctions. By proceeding in this manner, the Fourth Circuit will have all issues before it in one appeal. In addition, the Court expects to rule on the attorneys' fees and sanctions —and explain the reasons for denying the instant motion —by March 31, 1989. Failure to do so would only be caused by my duty to sit on the Fourth Circuit occasionally while Chief Judge Winter's position is being filled, however, I would continue to give priority to all pending motions. In any event, the Court retains jurisdiction over the fees and sanctions while the appeal proceeds. *See, e.g., Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31 (4th Cir. 1987).

Notwithstanding the informal nature of this ruling, it constitutes an Order of the Court.

Very truly yours,

/s/ Joseph C. Howard
JOSEPH C. HOWARD

JCH:dp
Original: Court file
Copies: Counsel

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed October 15, 1990

No. 88-1161

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,
Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,
Defendants-Appellants

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L. S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,
Defendants

No. 89-1021

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,
Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,
Defendants-Appellants

ORDER

Appellees Barbara and David Buffington and appellants Donald Gaigalas and Ronald L. Tucker's petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell and Widener voted to rehear the case in banc; and Chief Judge Ervin and Judges Hall, Phillips, Murnaghan, Sprouse, Chapman, Wilkinson, Wilkins and Niemeyer voted against rehearing the case in banc. As a majority of the Judges voted to deny rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ADJUDGED AND ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Wilkinson and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed October 22, 1990

No. 88-1161

BUFFINGTON

v.

BALTIMORE COUNTY MD

No. 89-1021

BUFFINGTON

v.

BALTIMORE COUNTY MD

No. 89-1040

BUFFINGTON

v.

BALTIMORE COUNTY MD

No. 89-1054

BUFFINGTON

v.

BALTIMORE COUNTY MD

No. 89-1055

AUSTIN

v.

BUFFINGTON

MANDATE

The judgment of this court dated 7/31/90 takes effect today.

JOHN M. GREACEN
Clerk

Supreme Court, U.S.
FILED
FEB 4 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-1071 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA BUFFINGTON, *et al.*,
Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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February 4, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court below erred in its fact-bound determination that, in the circumstances of this case, plaintiff's injury was not caused by a municipal custom or policy but, rather, by the actions of individual police officers in contravention of an established policy.

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STATUTE

42 U.S.C. § 1983 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1071

BARBARA BUFFINGTON, *et al.*,
Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents hereby oppose the petition for a writ of certiorari filed by Barbara Buffington, *et al.*, in this case.

STATEMENT

This petition grows out of a suit petitioners brought under 42 U.S.C. § 1983 seeking damages for the deprivation of constitutional rights petitioners' son James allegedly suffered as a result of his suicide while in a Baltimore County jail.[1] Respondents offer a brief counter-

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[1] Petitioners also sought damages under state wrongful death and survival statutes.

statement in order to place petitioners' lengthy recitation of the facts and their central argument—that the court below engaged in improper appellate factfinding—in proper perspective.

1. On the morning of March 19, 1987, petitioners' son, David, notified Baltimore County Police that his brother James had penned a suicide note and had driven off in his parents' automobile, apparently with several of his father's firearms. Shortly thereafter, Officer Lewis Harvey apprehended James and placed him in protective custody in the Wilkens precinct station. After learning of his brother's arrest, David Buffington contacted Officer Harvey to remind him of James' history of emotional problems and to stress that James was at extreme risk of committing suicide. Officer Harvey explained that preparations were being made to transfer James to Greater Baltimore Medical Center for an emergency psychiatric evaluation, and suggested that David press criminal charges to permit the police to hold James in the event the hospital declined to accept an emergency commitment.

Upon arrival at the station, James was handcuffed to a rail beside the station's booking desk where he could be observed by the desk officers. At approximately 6:15 a.m. that morning, Officers Donald Gaigalas and Ronald Tucker took over as desk officers. Ten minutes later, Officer Gaigalas freed James from the rail and placed him alone in the female lockup area. Gaigalas did not remove any of James' clothing and made no provision to keep him under observation. Approximately 45 minutes later, James was found hanged from the cell's horizontal bars by a noose he had made from his pants.

2. In the courts below, petitioners pursued several conflicting theories of liability against the various named defendants. With respect to Officers Gaigalas and Tucker, petitioners argued that the officers' "*depart[ure] from accepted standards and procedures*" led to James'

suicide. Brief of Appellees at 21 (emphasis added). At trial, counsel for petitioners repeatedly elicited testimony that the handcuffing of suicidal detainees to the booking desk was a standard policy and practice in the Wilkens precinct.[2] Counsel likewise demonstrated that the desk officers were aware of this policy. Counsel's cross-examination of Officer Gaigalas, for example, included the following exchange:

> Q: You *knew the rule was that no one being held for an [emergency psychiatric] evaluation was to go into lockup*; you knew that, didn't you?
>
> A: That was Sergeant Yuska and the other supervisors' practice and procedure, yes.

App. 1411 (emphasis added). Counsel further argued that the violation of this policy led directly to James Buffington's death.[3]

Petitioners adhered to this position on appeal. They posited that "all of the officers who came in contact with James *acknowledged the verbal 'standing order' of Sergeant Yuska that no known suicidal detainee should be*

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[2] *See, e.g.*, App. 1161-62 ("It was standard policy on the shift" and "no known or suspected suicide was ever put back in the lockup") (testimony of Officer Harvey); 1206, 1224 ("practice" is for suicidal detainees "to remain at that bar") (testimony of Sergeant Yuska); 1301 (testimony of Officer Gribbin); 1336 (testimony of Officer France); 1367-69 (testimony of Officer Maeser); 1389-90 (Sergeant Yuska's "training and standard instruction" was not to put suicidal detainees in lockup) (testimony of Officer Gaigalas); 1911-12 (there "was an informal policy that suicidal individuals . . . were not to be placed in cells") (testimony of petitioners' expert).

[3] On direct examination, counsel for petitioners asked Sergeant Yuska:

> you would agree, would you not, that the failure of your desk officers to inform you that Buffington was suicidal *was a violation of your training and your practices and directly led to the suicide of James Buffington, wouldn't you?*

App. 1224 (emphasis added).

put into a lockup." Brief of Appellees at 16 (emphasis added) (citing record); see also *id.* (referring to "verbal, unwritten policy of keeping suicidal detainees at the front desk"). Petitioners argued that "Officer Gaigalas' failure to conform to accepted standards and procedures 'could only be described as shocking,' " and that "Officer Tucker's failure to ensure that James stayed handcuffed to the rail at the front desk . . . was an 'extremely grievous' departure from accepted police standards and procedures." *Id.* at 21-22 (quoting record).

Petitioners sought to hold the County and Chief of Police Behan responsible for James' suicide on two "alternative" theories—"failure to train" and "condoned custom"—both of which conflict with the theory of liability offered against Officers Tucker and Gaigalas. Thus, despite having established that James' death resulted from the desk officers' violations of precinct policy and practice, petitioners argued that James' suicide was also the result of Chief Behan's failure "to promulgate a *written* regulation requiring the constant monitoring of suicidal detainees" (*id.* at 15, emphasis added), and his failure to implement suicide screening and prevention training programs. In addition, and as a supposedly "alternative" theory of liability, the Buffingtons argued that the County had a custom of condoning the type of inadequate handling of suicidal detainees that led to James' death. In this regard, petitioners relied, in part, upon the department's purported "cover-up" investigation of James' death—one aspect of which, petitioners argued below, was the investigating officer's failure to "comment upon the . . . *violation of* [*the precinct's*] *policy of constant observation,*" (*id.* at 24) (emphasis added), or even to "refer to Sergeant Yuska's *standing orders regarding suicidal detainees.*" *Id.* at 28 (emphasis added).

The case was submitted to a jury with instructions that it "could find more than one proximate cause of the

suicide." *Id.* at 33. Based on these instructions, the jury returned verdicts against Officers Tucker and Gaigalas, Chief Behan and the County on petitioners' § 1983 and state law claims. The jury, however, rejected petitioners' claim against the precinct captain and four other officers, and rejected the claim that the County, Chief Behan, the precinct captain and another officer had participated in a conspiracy to cover-up the investigation of James' suicide.

3. On the same day the district court denied respondents' motion for judgment notwithstanding the verdict, this Court ruled, in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), that municipal liability cannot be premised on proof "that an injury or accident could have been avoided if an officer had had better or more training." *Id.* at 391. The Court held that, to establish municipal liability on a "failure to train claim," a plaintiff must demonstrate "that the deficiency in training *actually caused* the police officers' " misconduct. *Id.* (emphasis added).

On the basis of this intervening decision, a unanimous panel of the Fourth Circuit reversed the § 1983 verdicts against the County and Chief Behan. The court accepted petitioners' evidence and contention that "better suicide prevention training, closer adherence to national standards on jail suicide prevention, written regulations, or some combination of these would have served to avoid [James Buffington's death]." Pet. at 17a. Nevertheless, the court held,

> *Canton* has made clear that municipal liability under § 1983 may not rest on such proof. This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following the precinct's official policy and customary practice of keeping Buffington handcuffed to the rail.

Id. at 17a-18a (citations omitted). Put differently, the court below recognized that, under *Canton*, petitioners'

theories of individual and municipal liability were mutually exclusive: Officers Gaigalas' and Tucker's failure to follow the customary precinct practice (of which they were both aware) of handcuffing suicidal detainees to the booking desk, and the County's failure to adopt a variety of suicide prevention programs, simply could not *both* be the "moving force" behind James Buffington's death. *Canton*, 489 U.S. at 389. On the particular facts of this case, the Fourth Circuit's decision was manifestly correct and raises no issues warranting review by this Court.

REASONS FOR DENYING THE PETITION

Although petitioners purportedly offer three independent reasons justifying an exercise of this Court's certiorari jurisdiction, all three are simply different formulations of the same claim—namely, that the Fourth Circuit engaged in impermissible appellate factfinding. Even if true, this entirely factbound claim raises no questions worthy of this Court's attention. In any event, the unanimous decision below was factually correct, and is consistent with municipal liability decisions in other circuits as well as the governing standards established by this Court.

A. Petitioners contend that the decision below creates a sharp conflict among the circuits concerning the proper role of the jury in determining issues of causation in "failure to train" and "condoned custom" cases. As petitioners themselves acknowledge, however, this supposed conflict only arises "[o]nce it is understood that the Fourth Circuit's view of the 'official policy and customary practice' [of the Wilkens precinct] is contrary to the record in support of the verdict." Pet. at 25.

Petitioners' argument is nothing more than a strained attempt to disguise a claim of improper appellate factfinding as a conflict among the circuits. The court below did not rule, or even intimate, that questions of causation

in cases such as this are not for the jury, or that they necessarily must be "decided as a matter of law in cases proceeding on both failure-to-train and condoned custom theories." Pet. at 26. On the contrary, the court canvassed the evidence petitioners marshalled concerning the lack of written regulations and training, the failure to adhere to national standards, the prior suicide expisodes and the lack of disciplinary actions (see *id.* at 6a, 17a), but found this evidence insufficient, under the circumstances of this case, to permit the jury to find that any County policy or custom was the "moving force" causing James Buffington's death.

The entire predicate underlying petitioners' claim of improper appellate factfinding, moreover, is flatly incorrect. Much of their 25-page factual recitation is devoted to disputing the Fourth Circuit's determination that the Wilkens precinct had a policy or custom of handcuffing suicidal detainees to the booking desk railing. Yet it was petitioners *themselves* who introduced the evidence of that policy and argued to the jury and to the court of appeals that Officers Gaigalas' and Tucker's knowing violation of that policy led to James' death. See *supra* at 2-4 & nn. 2-3. Indeed, while petitioners now suggest that the Fourth Circuit's determination "can only be based upon an extremely selective reading of . . . isolated testimony" (Pet. at 18), the court below was *obligated* to accept the existence of such a policy, inasmuch as the existence of that policy was essential to the jury's verdict against the desk officers.[4]

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[4] It is thus unnecessary to address the evidence that allegedly undermines the existence of the precinct policy (see Pet. at 19-20). Nevertheless, it is worth pointing out that petitioners' use of this testimony is as disingenuous as their attempt to disavow their own evidence below. In the court of appeals, petitioners noted that "all of the officers who came in contact with James acknowledged the verbal 'standing order' of Sergeant Yuska that no known suicidal detainee should be put into lockup," Brief of Appellees at 16, but argued that, because the policy was unwritten, other County

Given the existence of the Wilkens precinct policy, the Fourth Circuit's further determination that petitioners' remaining evidence was insufficient to establish municipal liability under *Canton*'s causation standard is unassailable. As petitioners themselves argued below, it is undeniable that compliance with Sergeant Yuska's standing order would have prevented James' suicide, and that Officers Tucker's and Gaigalas' violation of that policy caused James' death. All of the evidence concerning the County's inadequate preventive measures merely demonstrates that the "injury or accident could have been avoided if [Tucker and Gaigalas] had had better or more training." See *Canton*, 489 U.S. at 391. This Court, however, has made clear that such proof is inadequate. "Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the [Wilkens precinct policy, which] enable[d] officers [Tucker and Gaigalas] to respond properly to the usual and recurring situations with which they [had to] deal." *Id.*

This factbound determination, moreover, does not conflict with decisions in other circuits. The decisions petitioners cite involving the sufficiency of causation evidence in municipal liability cases[5] all recognize, as did the

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witnesses were able to deny "the very existence of a policy . . . [when] convenient." *Id.* at 15. Thus, petitioners impugned the integrity of the very testimony they now claim the Fourth Circuit improperly ignored. See also *id.* at 16 ("the verbal, unwritten policy of keeping suicidal detainees at the front desk was *allegedly* unknown to every high ranking official within the department who testified at trial, including Major Hauf, Major Shinnamon, and Colonel Messina") (citations to the record omitted; emphasis added).

[5] Two of the cases petitioners cite do not involve municipal liability at all, but rather the liability of individuals under § 1983. See *Greason* v. *Kemp*, 891 F.2d 829 (11th Cir. 1990) (scope of qualified immunity); *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989). Another pre-dates this Court's decision in *Canton*

Fourth Circuit here, that the municipal policy must be the moving force behind the constitutional injury. See *Berry* v. *City of Muskagee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (there must be "a direct causal connection between the municipal policies in question and the constitutional deprivation"); *Santiago* v. *Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) (plaintiff's claim must "implicate the [municipal] policy as the moving force [behind] the constitutional deprivation") (citations and internal quotation marks omitted); *Bordanaro* v. *McLeod*, 871 F.2d 1151, 1162 (1st Cir.) ("municipal policy must be affirmatively linked to and the moving force behind the constitutional violation"), *cert. denied*, 110 S.Ct. 75 (1989). Simply because courts applying this same standard may have reached different results concerning the sufficiency of *different* evidence in no way demonstrates a division among the circuits.[6]

B. Petitioners argue that this Court should review the decision below in order to establish the "sufficiency of causation proof in cases based on alternative theories of failure to train and condoned custom and failure to discipline." Pet. at 26. There are at least two reasons why this Court should decline this invitation.

First, there is not the slightest indication in *Canton* itself that the standard of *causation* in municipal liability cases should vary depending upon whether the plaintiff proceeds on a failure to train or condoned custom theory. On the contrary, *Canton*'s causation standard is derived from the long-standing principle that a "municipality can

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by six years, see *Trudeau* v. *Wyrick*, 713 F.2d 1360 (8th Cir. 1983), and a fourth does not address the question of causation at all. See *Kerr* v. *City of West Palm Beach*, 875 F.2d 1546, 1555-57 (11th Cir. 1989) (discussing existence of municipal policy).

[6] In fact, in *Santiago* v. *Fenton*, the First Circuit affirmed summary judgment in favor of a municipality after concluding that the plaintiff's factual allegations "fail[ed] to reach the high standard the Supreme Court has set out for a finding of liability for inadequate training of police officers." 891 F.2d at 381.

be found liable under § 1983 only where the municipality *itself* causes the constitutional violation." 489 U.S. at 385 (emphasis in original) (citing *Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658 (1978)). Thus, whether a plaintiff proves fault through a policy or custom, he or she must demonstrate that the policy or custom "actually caused" the injury at issue. The Fourth Circuit's decision in this case is entirely consistent with this principle.

Second, *Canton*'s causation standard is so obviously applicable to condoned custom cases that petitioners are unable to identify a single decision even questioning its applicability in such cases, let alone a decision applying a different standard. Indeed, in the one case they cite that involved condoned custom and inadequate training claims, the court applied the same standard of causation to both claims. See *Bordanaro*, 871 F.2d at 1157 ("a municipal *custom* must have been the 'moving force' behind the plaintiff's injury") and *id.* at 1162 ("municipal *policy* must be . . . the moving force behind the constitutional deprivation") (emphases added). That decision, like the Fourth Circuit's here, is clearly correct. In the absence of any confusion, let alone division, in the lower courts, there is simply no reason for this Court to "further shape the contours of municipal liability in the context of litigation prosecuted on alternative theories of failure to train and condoned custom." Pet. at 27.[7]

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[7] Even assuming this causation question were otherwise worthy of, and ripe for, consideration, this case is not the appropriate vehicle for addressing the issue. While petitioners now suggest that they pursued two distinct theories of liability below, they have used their theoretical labels interchangeably throughout this case, suggesting at different times, for example, that the County's inadequate training both "perpetuated the department's custom of deliberate indifference" (Pet. at 7; Brief of Appellees at 17), and "proved" the existence of that custom. Brief of Appellees at 38. Thus, here as in *Canton* itself, petitioners' condoned custom claim "appears to be little more than a restatement of [a] failure-to-train as policy claim." 489 U.S. at 386 n.5. This confused presentation

C. Finally, petitioners suggest that this Court should exercise its supervisory powers in order to remedy the Fourth Circuit's alleged violation of their Seventh Amendment right to a jury trial. As respondents have previously demonstrated, however, the decision below was factually and legally correct: applying the proper standard of review, the court found that, in the unique circumstances created by the verdict against Officers Tucker and Gaigalas, petitioners' evidence was insufficient to satisfy *Canton*'s causation standard with respect to the municipality itself. That determination did not deny petitioners their right to a jury trial, and provides no occasion for this Court to exercise extraordinary powers simply to "reaffirm" and "repeat[]" well-settled principles of appellate review. Pet. at 29.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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precludes any meaningful examination of the causation question petitioners proffer.

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IN THE

Supreme Court of the United States

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BARBARA BUFFINGTON, *et al.*,
Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief is submitted on behalf of the petitioners in order to correct the most serious misstatements and distortions of issues in respondents' Brief in Opposition ("Opp.").

I. THE COURT BELOW WRONGLY ENGAGED IN *DE NOVO* FACT-FINDING

A. The Court Erred In Finding A Policy And Practice Of Handcuffing Suicidal Detainees To The Booking Desk

In an effort to paper over the extensive *de novo* fact-finding of the Court of Appeals, respondents repeatedly assert that the decision below was factually correct. (Opp.

6, 7, 11). This assertion is false. Its falsity is apparent from a simple comparison of the trial transcript references (Pet. 19-21) and the opinion of the Court of Appeals. Nine witnesses at trial either flatly denied or did not know of a purported policy or custom to handcuff suicidal detainees to the front desk. *Id.* Notwithstanding the utmost respect and deference that should be given to jury awards,[1] the Court of Appeals made a *de novo* finding that the County in fact did have a policy and custom of handcuffing suicidal detainees to the front desk (Pet. 17, 18).

Respondents seek to support this *de novo* finding by providing references to the testimony of eight witnesses (Opp. n.2). Respondents fail to mention that out of these eight witnesses, four of them (Yuska, Gribbin, Maeser and Harvey) provided *contradictory* testimony on this point.[2] Obviously, it is not the role of a court of appeals to weigh conflicting testimony. This task is exclusively within the province of the jury.

Incredibly, respondents rely upon Officer Gaigalas, an admitted perjurer, to further undergird the Court of Appeal's finding as to policy and custom (Opp. 3). At trial, Officer Gaigalas confessed to perjury. Gaigalas testified as follows:

> Q. In the course of and throughout your deposition last July, you testified to the effect that you had no prior knowledge that Jim Buffington was suicidal or

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[1] *E.g., Parker v. District of Columbia*, 850 F.2d 708, 711 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1339 (1989).

[2] Apx. 1205-06 (Yuska *denied* that he promulgated "standard procedures or policies," he merely stated that it was "*my* practice, which was a good habit *of mine*," and stated "[i]t's not a policy or something written in rules and regulations"); Apx. 1301 (Gribbin stated that "it was not a blanket statement that was . . . attributed to the entire station"); Apx. 1367 (Maeser stated: "I would not say policy"); Apx. 1161 (Harvey said: "[i]t's not an order," and "I wouldn't even call it a policy.").

that he was being held for emergency psychiatric evaluation before you placed him into the lockup, correct?

A. Yes, sir.

Q. Your testimony in that regard was false, was it not?

A. Yes, it was.

Q. It was deliberately and knowingly false, wasn't it?

A. Yes, sir.

Apx. 1406. This case thus presents an especially extreme example of why appellate courts are not permitted to assess the credibility of witnesses. The credibility of virtually every police officer was called into question, and it was the exclusive role of the jury to sort out the conflicting testimony.

Testimony concerning a "policy" to properly monitor suicidal detainees, to the extent that it was credited by the jury, provided support to plaintiffs' theory of the case. The jury could have found this was a "policy" that either did not exist or was never enforced. The failure to enforce the policy could have been regarded as proof of an unconstitutional custom. Regardless of whether it actually existed, or whether it can accurately be portrayed as a "policy," it is clear that every officer testifying on this subject necessarily acknowledged that they frequently encountered the problem of suicidal detainees, and that the very nature of the problem was a matter of life or death. The chronic nature of this problem was proof of the County's deliberate indifference within the meaning of the *City of Canton v. Harris*, 489 U.S. 378 (1989).

Even if an informal policy did exist, and even if this testimony had been undisputed at trial, there still would be no basis for the Court of Appeals to find an absence

of causation. It flatly ignores the evidence as to Chief Behan's failure to punish Officers Gaigalas and Tucker for violation of the purported policy; and further ignores the testimony as to numerous prior suicide episodes. If such a policy can be said to exist, it was clearly honored in the breach. As recognized by the Sixth Circuit, a policymaker's "failure to supervise and correct the situation in view of the numerous similar incidents and his failure to subsequently punish the responsible individuals is more than sufficient evidence of a policy or custom to render the County liable . . . ." *Leach v. Shelby County Sheriff*, 871 F.2d 1241, 1248 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2173 (1990).

Respondents falsely state that the Fourth Circuit "canvassed the evidence petitioners marshalled concerning . . . lack of disciplinary actions." (Opp. 7). In fact, the Fourth Circuit's opinion does not mention a single word concerning the lack of punishment and the systemic lack of discipline. Such evidence was wholly disregarded notwithstanding the fact that such evidence in and of itself was sufficient to support the finding of municipal liability (Pet. 22, 24).

The bottom line analysis is that the jury was told that within the Baltimore County Police Department, "there is no such thing as informal policy," (Apx. 1544) and that an officer is immune from disciplinary action unless he violates a *written* Departmental rule or regulation. (Apx. 1972-73).

The Buffiingtons do not contend that the Due Process Clause requires every police department in the nation to adopt and adhere to a *written* regulation saying that openly suicidal detainees must be constantly observed. However, if a police department (like Baltimore County) is institutionally organized so that discipline is impossible unless a *written* rule is broken, it is abundantly clear, under these circumstances, that a written regulation is the only meaningful method for ensuring com-

pliance with constitutional standards. Thus it can be seen that in Baltimore County, an informal, unwritten *ad hoc* "policy" of monitoring detainees is meaningless, and only serves to exacerbate the problem of suicides in police lockups.

B. There Is No Record Basis For Claiming That The Cover-Up Theory Was Rejected By The Jury

The respondents also incorrectly assert that the jury rejected petitioners' claim that the County and Chief Behan covered up the misconduct that led to Buffington's suicide (Opp. 5). The existence of a cover-up is revealed by the fact that Officers Gaigalas and Tucker engaged in extreme misconduct, and notwithstanding this extreme misconduct were exonerated by the Department instead of being disciplined. In other words, their extreme misconduct was covered-up. Thus it can be seen that the existence of a cover-up follows necessarily from the Department's failure to recognize the misconduct.

Merely because the jury did not return a verdict against Captain Kramer does not mean that the jury rejected the Buffingtons' cover-up theory.[3] On the contrary, the Buffingtons did, in fact, prove a cover-up of the police misconduct which caused their son's suicide, and the jury's verdict against Baltimore County and Chief Behan is entirely consistent with such proof. As instructed by the district court (Apx. 2248), a failure to conduct a thorough investigation into the Buffington suicide, and/or prior suicide episodes, may be used as evidence of an unconstitutional policy, maintained by Balti-

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[3] As instructed by the district court, Captain Kramer's liability was predicated on his responsibility for the safekeeping of suicidal detainees in custody at the Wilkens Precinct. (Apx. 2246). There is no support in the record for respondents' argument that Captain Kramer's liability was premised exclusively on his failure to expose and/or his concealment of his officers' wrongdoing. The jury could have simply determined that the proof as to Captain Kramer, personally, was not so egregious as to constitute deliberate indifference.

more County and Chief Behan, of non-supervision of police officers. *E.g., Fiacco v. City of Rensselear*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1384 (1987). Similarly, the jury was instructed (Apx. 2248-2249) that an active cover-up of extreme police misconduct could be used as evidence of an unconstitutional policy maintained by Baltimore County and Chief Behan towards suicidal detainees. *E.g., Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). Because the jury's verdict is entirely consistent with an acceptance of plaintiffs' proof of a cover-up, there is no basis for respondents' argument that the jury rejected this theory of liability. It is settled that "juries act in accordance with the instructions given them." *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) (per curiam). The jury was instructed on the cover-up theory, and an appellate court "must interpret the entire record in the light most favorable to [the prevailing party] and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be reasonably drawn." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985). Thus there is no valid basis for claiming that this theory was rejected by the jury.

C. The Evidence Of Custom Was Wholly Ignored

As explained in the Buffingtons' Petition (Pet. at 19-24), the Fourth Circuit focused exclusively on the failure to train theory of liability and totally ignored the Buffingtons' additional evidence of unconstitutional custom. As recognized by the Third Circuit, "[a]s long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement *should be left to the jury.*" *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990) (emphasis added). In reversing a directed verdict entered for the city, the Third Circuit in *Bielevicz* stated as follows:

> [T]o sustain a § 1983 action against the City, plaintiffs must simply establish a municipal custom coupled with causation—i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury. If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance *is a question of fact for the jury.*

Id. at 851 (emphasis added). Thus the Third Circuit held that the question of causation was properly left to the jury.

In finding a lack of a jury question on causation in the instant case, the Fourth Circuit has in effect held that municipal liability cannot be established on the basis of an alternative theory of custom. The Fourth Circuit is therefore obviously in need of this Court's supervisory guidance as to the sufficiency of causation evidence when municipal liability is premised on alternative theories of failure to train and/or condoned custom.

II. LIABILITY AGAINST THE OFFICERS AND THE COUNTY IS NOT MUTUALLY EXCLUSIVE

Finally, respondents are mistaken in contending that the theories of liability against the officers and the County were mutually exclusive. Respondents argue:

> Petitioners' theories of individual and municipal liability were mutually exclusive: Officers' Gaigalas' and Tucker's failure to follow the customary precinct practice (of which they were both aware) of handcuffing suicidal detainees to the booking desk, and the County's failure to adopt a variety of suicide prevention programs, simply could not *both* be the 'moving force' behind James Buffington's death.

Opp. at 5-6 (emphasis original). Respondents suggest that there can be but one "moving force" behind James Buffington's death (Opp. 6).

Respondents have overlooked controlling precedent on this point. In *Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam), the Court held that a municipality could not be held liable under § 1983 unless there was an underlying constitutional violation by the municipality's police officers. In *Heller* the Court held that the jury's finding that the police officers inflicted no constitutional injury on the plaintiff eliminated any basis of liability aganst the city. The Court stated:

> [N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations may have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. at 799 (emphasis original). Thus as a matter of logic and evidence, the moving force behind the failure to prevent the suicide of James Buffington was the unconstitutional policy and custom of the County *and* the deliberate indifference of the individual police officers acting pursuant to that policy and custom.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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